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STATE GOVERNMENT

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STATE GOVERNMENT

BY
WALTER F. DODD

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TO
SUE HUTCHISON DODD

PREFACE

This book outlines the organization and problems of state government in the United States. The various forms of local government are discussed as parts of the state governmental organization, rather than as independent institutions. No series of independent chapters is devoted to local and municipal government, because of the conviction that governmental problems within the state can be understood only if treated as a unit. The nation, the state, and the state's local areas are regarded as parts of a single organization for the conduct of governmental business.

The author has attempted to preserve a balance between critical discussion and detailed illustration. Little is gained by a detailed enumeration of specific instances. In discussing comparatively the institutions of forty-eight states, a complete and detailed survey can not, in the nature of things, be given. The reader must be relied upon to make specific application to the conditions of his own state. This book will have accomplished a large part of its purpose if it stimulates such an application. The picture in this volume is necessarily a composite, but it may aid each reader in obtaining a true picture of the government of the state in which he lives. The author and his wife have attempted to present the picture of a single state, in a book on *Government in Illinois,* to be issued by the University of Chicago Press. For illustrations typical of general conditions the author has drawn largely from the states with which he has had practical experience, but has at the same time sought to call attention to the important institutions of all states.

Detailed citation of authorities has been avoided. The

texts of state constitutions are easily available, and it is not usually difficult to locate the specific provisions of such documents. Thorpe's collection of *Federal and State Constitutions* (Washington, 1909, 7 vols.) is a necessary aid in the use of earlier state constitutions. Charles Kettleborough, *State Constitutions* (Indianapolis, 1918), gives in convenient form the state constitutions in force; though this volume must be supplemented by a study of new constitutional amendments which are steadily being submitted and adopted. For ready reference to the provisions of state constitutions, use may be made of the *Index-Digest of State Constitutions,* prepared for the use of the New York constitutional convention of 1915. Constitutions of a particular state may usually be obtained by writing to the secretary of state at the state capital.

For the years 1910 to 1919 *The American Year Book* is the most useful source of information regarding state constitutional and governmental developments. The New York State Library's *Indexes* and *Reviews of Legislation* and *Reviews of Governors' Messages* were the most important source of information until their suspension in 1908.

Among current sources of information regarding state constitutions and state government, the most important is the *American Political Science Review.* In this journal Mr. Kettleborough at frequent intervals presents information regarding state constitutional changes; and legislative notes cover the most important points in the field of government. The author of this volume desires to thank those who have aided him in editing the department presenting these legislative notes. The source of current information next in importance to the *Review* is the *Public Affairs Information Service.* Through this service annual indexes of laws and monthly bulletins are issued. Here will be found, month by month, a catalogue

of the important literature and the important events in the sphere of state government.

No effort has been made to list all books and articles bearing upon state government and its problems. To attempt such a task would make this book a bibliography rather than a treatise. Foot-notes refer to the more important literature. Notes at the end of a number of the chapters indicate matters of further interest, and in some cases call attention to published material of value. The periodical literature may be readily discovered through the general magazine indexes and the index of legal periodicals. For an understanding of state government, magazine articles are, however, not so important as the documentary material listed in the *Public Affairs Information Service.*

In this volume the author has drawn freely from the *Constitutional Convention Bulletins,* issued under his direction by the Illinois Legislative Reference Bureau in 1919 and 1920. He wishes to take this opportunity of acknowledging the large share in the preparation of these bulletins borne by Professor John A. Fairlie of the University of Illinois. The official limitations upon the publication of these bulletins prevented a full acknowledgment of this service.

The author has been fortunate enough to have some practical share in many of the governmental problems discussed in this book. This practical experience strengthens his feeling that we need a much more detailed and scientific observation of the manner in which governmental institutions work. Much that is not true passes for knowledge, because of our ignorance.

In the preparation of this volume aid has been received from numerous friends. The manuscript has been read by Professors John A. Fairlie and Russell M. Story of the University of Illinois; by Professor Leonard D. White of the University of Chicago; and by Mr. George E. Frazer of Chicago. Each of them has made a number

of helpful suggestions. Professor Frederic A. Ogg, the editor of the series, has also read the entire manuscript and given valuable advice. Professor Charles E. Merriam of the University of Chicago has aided in improving chapters xvii to xix; and Mr. Herbert Harley, secretary of the American Judicature Society, has done a like service for the chapters dealing with the courts. The author's wife has been of constant assistance, with both the manuscript and the proof. To all of these and others the author is under obligation. He alone is responsible for matters of detail and for any errors that may be found. Portions of chapters ix and x first appeared as an article in the August, 1921, number of the Journal of the American Bar Association.

Walter F. Dodd.

Chicago

CONTENTS

CHAPTER		PAGE
I	The Work of the State	3
	Government Includes Everybody	4
	Government Acts by Law	14
	Government Supports Itself by Taxation	19
	Popular Share in Government	20
II	The Nation and the States	24
	The Character of the American Federal System	24
	Share of States in the Government of the Nation	30
	National Powers and the States	38
	Interstate Relations	50
III	The State and Its Subdivisions	54
IV	The Framework of State Government	74
	The Three Departments of State Government	75
	Public Employees	86
	Local Administration and Its Relation to the State	88
	Public Education	89
	Means by Which Government Supports Itself	89
	Position of the State in the Nation	90
	Political Parties	90
	How Changes in the Framework of Government Take Place	91
V	The State Constitution	93
	Readjustment of Powers of Departments	94
	Limitations upon Legislative Power	98
	Popular Participation in Government	101
	Character of Present State Constitutions	103
	Methods of Changing Constitutions	111
VI	The Limits of State Governmental Power	129
	Character of Limitations	129
	Judicial Enforcement of Limitations	133

CHAPTER		PAGE
VII	Organization of the State Legislature	156
	The Legislature of Two Houses	156
	Size of Legislative Bodies and Apportionment of Members	163
	Election of State Legislatures	177
	Sessions and Compensation	183
VIII	The Work of the State Legislature	188
	Character of Legislative Work	188
	Legislative Procedure	193
	The Governor's Share in Legislation	214
	The Place of the Legislature in the State Government	219
IX	Development of the State Executive	233
X	Reorganization of the State Executive	248
	Attempts to Reorganize State Administration without Increasing Power of Governor	250
	Attempts to Better Conditions through Power of Governor	256
	Complete Administrative Reorganizations	259
	Chief Problems of State Administrative Reorganization	262
XI	The Enforcement of State Policy	279
XII	The Work of the State Courts	300
	Civil Cases	304
	Criminal Cases	310
	Practice of the Law	322
XIII	The Organization of State Courts	325
	Outline of Judicial System	325
	Choice of Judges	330
XIV	The Adjustment of Judicial Organization to Present Judicial Tasks	341
XV	Local Government and the State	360
	The County	364
	Towns and Civil Divisions of the County	380
	Cities and Villages	388

CHAPTER PAGE

School Areas 396
Special Districts for Other Purposes 398
Relationships Among Areas Covering the Same Territory 401
Chief Problem of Local Government 404
Relation of Local Governments to the State . . 407

XVI State Finance 410
The Nature of State Expenditures 410
State Revenues 421
Deposit of State Money 433
The Budget 434
State Debts 442
Local Finances and the State 445

XVII The Conduct of Elections 454
Who May Vote 454
The Task of the Voter 463
The Machinery of Elections 467

XVIII The Expression of Political Opinion . . . 476
The Two-Party System 476
Legal Control of the Party 480
Organized Expression of Political Opinion . . 484

XIX The Initiative, Referendum, and Recall . . 502
Development of the Initiative and Referendum . 505
Analysis of the Initiative and Referendum . . 510
Results of Popular Voting under the Initiative and Referendum 526
Effectiveness of the Initiative and Referendum as Instruments of Popular Government . . . 533
The Recall 540

XX The Future of the State 546
The Chief Lines of State Governmental Development 551
Model State Constitution Proposed by National Municipal League 556
The Twofold Problem of State Government . . 559
The Present Direction of State Progress . . . 565

Index 573

STATE GOVERNMENT

STATE GOVERNMENT

CHAPTER I

THE WORK OF THE STATE

The state's relation to national and local government

GOVERNMENT is an organization for the doing of certain tasks for the community. State governments, in the United States, are organizations lying midway between the national government on the one hand and various types of local government on the other. Under the constitution of the United States, the states are units in the formation of the nation. Viewed from within its own borders alone, the state government is not merely the organization that finds its center in the state capital; but it is this central organization together with all the local governing bodies which unite to perform the tasks of the state. National, state, and local government are but different though closely interrelated types of organization for the performance of certain similar functions over the same territory.

Government differs from other social organizations

Government as we now know it in this country differs from other social organizations in several respects: (*a*) It is the one organization that includes and controls everybody within its territory.[1] (*b*) Government acts through law. (*c*) Government supports itself by means of taxation. (*d*) All persons of sufficient maturity have a voice in the conduct of the government, except as disqualified because of crime, insanity, or certain other reasons.

[1] With certain minor exceptions, as for example with respect to official representatives of foreign nations.

GOVERNMENT INCLUDES EVERYBODY

CHAP. I

Adapts its work to needs of people

Government is merely a human agency for the purpose of meeting the needs, encouraging the ideals, and promoting the development of the people over whom it operates. As the only body that includes all of the people within its territory and acts with reference to the needs of all, government must necessarily vary its activities. In earlier and simpler days government existed primarily for the maintenance of order and the punishment of crime. In a purely agricultural community today, government may need to do little more. When we have a complicated industrial civilization, with power-driven machinery operated upon a large scale and with rapid means of transportation and communication, government must necessarily undertake a large number of activities. This increase in activities is justified to the extent that the new tasks assumed can best be done by an organization representing the people as a whole. Government exceeds its proper limits and necessarily tends to become inefficient when it attempts to do things that can be done more satisfactorily by the individual acting alone or in voluntary association with his fellows.

Reflects the activities of its people

In the things that it does and in the laws that it enacts, government represents the activities and interests of the people whom it controls. As the states move from cattle-raising to agriculture, and from agriculture to industry, changes take place in the functions and machinery of their government. Under our modern conditions, government maintains an elaborate educational system, cares for dependent classes who can not care for themselves, protects the health of those within its borders, and safeguards the varied and complex interests of the different groups within the community.

States vary in economic development

In the forty-eight states of this country we have a large degree of variations in industrial development. Some of the states are still primarily agricultural. Some

have mining as their chief industry, and some have great manufacturing and industrial establishments. It is naturally true, therefore, that the problems of governmental work vary a good deal from state to state. Not only this, but, within a particular state, different types of problems present themselves with respect to different parts of the state itself. In Illinois, for example, a large part of the state is still agricultural; and the state, in order to meet the needs of agriculture, has enacted and administers a great many laws with respect to the breeding of animals, dairy products, purity of seeds, etc. Mining is also one of the important industries of this state, and the state has enacted elaborate legislation for safety in mines, and has set up machinery for the inspection of mines in order to enforce these rules. A considerable part of the state is industrial in character, and in order to meet the needs of its industrial population the state has provided legislation regarding safety and health in factories, and has created a department of labor for the enforcement of these regulations. The problems of governmental activity, therefore, vary not only from state to state, but from one part of the same state to another.

The state's protective functions

The protective functions of the state have enormously increased during the past fifty years; and this increase is directly traceable to the development in most of our states of a highly industrial organization, which makes necessary a much greater degree of protection of the citizens. Naturally, of course, the highest degree of protection is needed in the congested areas. Within such areas the protective functions of government are shared both by the states and the local governing bodies. In the field of protective activity the national government has also, at the same time, enormously expanded its activities. There are many fields within which the protection of the citizen can not be safeguarded merely by action within one state, but in which the protection of the people of one state depends, and must depend, upon

CHAP. I

the governmental organization that controls traffic across state borders.

Education

A hundred years ago public education was substantially non-existent, and there are people who even to-day still argue that education is not a proper function of government. However, that sentiment is now held by only a few, and we to-day recognize public education as perhaps the most important task of government. It is the one task for which our governments, state and local, spend the greatest amount of money, and in a democratic organization it is clearly appropriate for governmental action.

Road construction and maintenance

The construction and maintenance of roads was early recognized as a proper field of state activity. State governments to-day undertake a large share of work in this field, and bear a large proportion of the expense of highway construction, though leaving much of this expense to their local communities.

Health: the poor and the defective

With the great increase in population in this country, and with the development of congested areas, the problem of health administration has enormously increased. National, state, and local governments unite in activities for the protection of the public health. With our great increase in population and the speeding up of modern industrial conditions has come also an increased need for better organization to take care of the poor and of the defective. In this field activities of the state have enormously increased, although here also there are national and local activities as well.

Industrial and agricultural activities

The development of large-scale industry and of mining have made it necessary that the states enact legislation for the protection of employees in factories and for the safeguarding of operatives in mines; and that at the same time an organization be built up for the enforcement of these safeguards. Until about ten years ago, the relationships between employer and employee in the

states of this country in case of accident were settled by judicial proceedings in each particular case, unless the employer and employee voluntarily agreed to a settlement. If an employee in a factory were injured, he sued his employer, and bore the expense of contesting with the employer the question as to whether the employer was liable for the injury, and as to how much the employer should pay to the injured employee if he (the employer) were finally held liable. During the past ten years legislation has been enacted in almost all of the states, placing a definite liability upon the employer for injury to his employees; and both employer and employees now agree that this legislation is more satisfactory than the previous arrangement. Legislation here was directly occasioned by the industrial needs of the community; and the states have set up organizations to administer this new type of legislation. Agriculture needs a greater and greater degree of governmental safeguarding in order to protect the quality of seeds and of fertilizers, to control or prevent plant and animal pests, and to insure the quality of agricultural products. In this field the nation and the state work in close cooperation.

Control of businesses affected with a public interest

Certain types and forms of industrial organization have come under governmental control. Corporations obtain charters from state authority; and, with the increased number of corporations, it has become necessary to organize better means for the granting of charters and the supervision of corporations. Special types of industry, such as banking, insurance, building and loan associations, and public utilities, bear such a close relationship to the every-day activities of the people of the state that the states have adopted elaborate regulations with respect to these activities, and set up machinery in their governments for the enforcement of these regulations. More recently, the unrestricted sale

CHAP. I

of securities has caused so much fraud that a great number of states have enacted so-called "blue sky" laws in order to protect investors.

Regulation of professions

The practice of the legal profession has always been to a large extent subject to supervision by the courts, but with the larger number of activities in which the lawyer participates it has been found necessary to organize a more detailed supervision over the legal profession and to raise the educational and other standards of those who are to practise law. The medical profession has for a number of years been subject to state regulation, and similar types of regulation have developed with respect to the practice of pharmacy, dentistry, and the other professions that have a close relationship to the public health. With the increased importance of construction of buildings, architects and engineers have to a great extent been brought under state supervision. The number of occupations and professions that must be regulated by governmental authority has by no means been exhausted.

Expansion of functions

The increase in governmental activities is not confined to the purely state government, but has been equally characteristic of the national government and of the various communities that go to make up our local governments. To some extent, the undertaking by government of so many additional things has caused a less effective performance of the primary functions of preserving order and administering justice. While governments are not always satisfactorily and competently organized for the performance of the tasks that they have now undertaken, it is possible to organize them more satisfactorily. Governments must be better organized if they are to be the effective agencies that they should be. Government has enormously expanded its activities during the past fifty years. There is no way by which we can determine what further expansion of these activities will take place within the next fifty years. It is therefore all the more

important that government should so organize as to perform satisfactorily the functions that it now has. It should also be able to meet satisfactorily new functions which the needs of the nation, the state, and the local community may require it to undertake.

Organization of government changes

New governmental policies do not execute themselves. With each new policy has come the establishment of new state or local governmental agencies for the enforcement of that policy. Changes in governmental activities and in governmental organization go hand in hand. Before the development of railroads and of a high industrial civilization, there was not much need for a complex organization of government. There is not so much need for a complex organization, and for a great number of activities of government, in some states as in others. Government may not need so complex an organization in some parts of the same state as in other parts. It must be borne in mind that to a large extent the government of any particular state reflects the types of economic, social, and industrial development of that state. In the study of state governments as a group, it is necessary to discuss generally those things that are characteristic of all state governments. In the study and discussion of state governmental problems for any particular state, it is essential to consider the problems of that state, and then to discover in detail the manner in which the state has organized and is operating with respect to these problems. In this volume no effort will be made to classify states under each detail of state governmental organization, but those who may use the book in a particular state are relied upon to make the application in detail to that state.

Similarity of state governments

There are many similarities in the governments of the several states. Superficially, all state governments appear more or less alike, and appear to be doing the same things. In this country there has been a constant shifting of population, and the inhabitants of an eastern

CHAP. I

state have tended to carry their institutions westward. Such institutions have not always been clearly applicable to the new conditions in another part of the country, and have changed in their operation even before legal changes have been made in them. The constant shifting of population from one state to another has, however, prevented the development of very sharp differences in the types of political institutions. Not only this, but there has been a great deal of copying from one state to another. The constitutions of the earlier states naturally had a definite influence upon later state constitutions and upon the national constitution. From the time of its framing in 1787, the national constitution has had a great influence on the forms of state constitutions, and of institutions organized in the several states.

Several governments over the same territory

Over the territory of every state we find not merely one government but a whole series of governments. The national government exercises authority over the territory of all of the states, and the national laws have authority over the citizens of the states. The central state government itself, of course, also has full jurisdiction over all of its territory.[1] The territory of each state is organized into counties.[2] In addition to counties, there are cities, villages, and various other areas of local government that cover most of the territory of each state. Government must be looked upon not purely from the standpoint of national government or of the central state government, but from the standpoint of all of the governmental bodies that exercise authority over the citizen. This book will, therefore, seek to treat state governments, not as something independent (for no state government is independent), but as the units that go to make up the nation, and which, through local govern-

[1] An exception to this statement must be made with respect to certain areas owned or controlled by the national government for military purposes, Indian reservations, and certain other purposes.

[2] In Louisiana the areas corresponding to counties in other states are called parishes.

mental bodies, perform numerous functions each within its own boundaries. No central state government performs all, or even the greater part, of the governmental activities within its territory. No state government is efficient that does not organize an effective means for the exercise of its functions through its various local governments; and all must work in close coöperation with the activities of the national government.

Differences in state government

Where two states have the same industrial developments and one occupies a smaller area than the other, the very difference in the size of the states involves a difference in their governmental problems. Where states differ in natural resources and in industrial development, their problems necessarily vary to a great extent, although dealt with in much the same manner, and their types of organization when closely examined will be found to differ.

Variations due to economic causes

In many states there is found a diversity of industrial and agricultural activities, but the proportionate importance of different types of activities necessarily varies. The functions of government vary with the varying importance of these activities. For example, in the great industrial states, like New York, Pennsylvania, Ohio, and Illinois, industrial activities will be found to reflect themselves directly in the activities of government. In states where fish and game are important, a greater degree of governmental emphasis will be placed upon their protection and regulation, as in Washington, Maryland, and New Jersey.

Government an historical development

Although state government is an agency for the meeting of present needs of the community, it must be borne in mind that government, like all other social institutions, is an historical development. We are largely governed to-day in the American states by a particular form of organization because of the fact that a certain type of organization seemed more appropriate when state constitutions were being framed in the early days of the

CHAP. I

American Revolution. When, in 1776, the first state governments came to form constitutions, they adopted a particular form of organization largely because of the colonial organizations to which they had been accustomed, and because of the contests that had been going on in previous generations between colonial legislatures and the British crown. It is impossible in government, as elsewhere, to divest ourselves of the historical basis of our civilization. State government in every one of the American states (no matter how recently that state may have been formed) is to a large extent determined by the activities and the institutions of previous generations. Some of these activities and institutions meet the needs of the present. Some do not. Those that do not meet present need will finally, but slowly, disappear. Those that do fit will continue. State government will always represent a combination of the experience of the past with the needs of the present, and will always have some remnants of things no longer needed. Such remnants will make difficulty, but the progress of social institutions is slow, and is accomplished only by a gradual dropping of past things that have clearly ceased to be useful, and by a gradual adoption of new institutions that slowly commend themselves as desirable.

Complexities of government

National and state governments are organized by constitutions into three departments. Local governments are divided into numerous diverse and substantially independent agencies. So complex, indeed, are the relationships and overlappings of government, that a well-informed citizen usually does not know all the governmental bodies by which he is controlled. It should be easy, however, for the citizen in any particular territory to find out what governmental authorities exercise power over him, and this is the first essential to the understanding of government.

Governments serve a common purpose

The whole of the complex governmental structure that we have set up is an organization for a common

purpose. The three departments of the national government and the three departments of each of our state governments exist for a common purpose; as also do all of the local governing bodies that have been established within each of the states. We have by constitutions and laws set up national, state, and local organizations in such a form as to appear independent; and we have in national and state governments set up three separate departments, which are apparently independent of each other. These artificial lines as between different types of government, and as among the departments within the same government, should not blind us to the fact that all are serving a common purpose. National, state, and local governments, for example, unite in the administration of health legislation. Such legislation is enacted by national, state, and local legislative bodies; is administered by national, state, and local executive organizations; and is enforced by the whole of our judicial organization, national and state. The problems of the different types of government and of the three departments of government are not fundamentally dissimilar. Our national and state legislatures pass laws for the purpose of laying down national and state policies; but these national and state policies relate primarily to matters that must be administered in detail by national and state executive organizations, and by local governmental organizations as agencies of the state; and these laws are construed and applied by the courts. Within almost all of the states, we have tended to set up a new local area for each type of local activity, and have enormously complicated our whole governmental organization. The nation, as far as it employs other areas of government, looks primarily to the forty-eight states as its units; but the states, when they employ local agencies for their activities, as they do to a very great extent, look toward a numerous and complex group of local governing bodies with overlapping territories.

CHAP. I

Organization for a single purpose

Government is not an end in itself, but a means to an end. Its activities and forms change to meet new conditions. When a new governmental need has developed in the state or in local communities, the tendency has been to set up a new and independent agency for the meeting of this need. Only of late have we come to recognize that government is not a series of different organizations (state, nation, county, city, etc.), each performing its tasks through independent departments, but that the work of government is a single task to be done through carefully planned and organized machinery, and by means of careful coöperation in nation, state, and local area.

GOVERNMENT ACTS BY LAW

Nature of law

One of the most distinct features of government is that it acts by law. Substantially all governmental policies are found embodied in law. The essential characteristic of law is that it has back of it the possibility of enforcement by government. Government may cause the individual to suffer some unpleasant consequences if he violates a law. For example, it is unlawful to assault and injure another, and any one assaulting and injuring another is subject to possible criminal punishment, and also to the possibility of having damages recovered from him by the injured party in a civil suit. Gambling is punishable as a criminal offense, and gambling contracts are by statute made unenforceable in the courts. Both the winner and the loser are subject to a threat of criminal punishment, and the winner is denied the aid of the court in collecting anything he may have won. Still another illustration may be given. In order to meet the conditions of modern industry, the states have provided by legislation that machinery in factories shall be guarded, and has also provided in substantially all of the states that it shall be unlawful to employ children under a certain age. An employer who violates

the child-labor law is not only liable to criminal penalties for such violation, but is also in most states liable in the courts for any injury occurring to a child as a result of such unlawful employment. Government imposes a double liability—criminal punishment and the liability to damages for the injury that has occurred.

National and state law

The term "law," as here used, means any general rule enforceable by governmental authority. The national government acts through laws passed by Congress, through treaties made by the President with the concurrence of two thirds of the members of the Senate, and through ordinances and regulations issued by the national government under express authority from Congress. All of these rules (adopted under powers conferred by the constitution of the United States) make up the body of national law. State law consists not only of laws enacted by the two houses of the state legislatures, but of various rules and regulations issued under the authority of state laws; and also, in most of the states, of a vast body of rules of common law developed by the courts through a period of centuries, and to be found in the decisions of the courts rather than in legislative acts.

Various types of law

Under state authority, cities, villages, and other local communities are given broad power to adopt local ordinances or rules, which form a part of the laws enacted by government. In a number of states, cities have by state constitutional provisions been expressly given broad powers in this respect, although in most of the states local communities derive from state legislatures their power to enact ordinances and regulations. In the field of health and building regulations, substantially every large city in the country has a body of ordinances that are adopted under the authority of the state, and which prescribe as to these matters more detailed restrictions than are needed in rural communities.

CHAP. I

Relationships of laws

A citizen will find himself governed by national law, state law, and usually by numerous types of purely local legislation adopted by the local communities that have authority over him. State law, of course, must not conflict with the constitution of the United States or with the powers of Congress as exercised under that constitution. State law determines the great body of rules for the governing of our daily conduct. The state constitution and state laws are superior to the ordinances or regulations enacted by governmental bodies within the limits of the state; although, in several of the states that have by constitutional provision adopted municipal home rule, there are oftentimes serious problems as to whether state laws of a certain type are superior or not to locally framed city charters and ordinances. The state has no power to make laws that conflict with laws properly enacted by the national government. The local communities within the state have no power to make laws or ordinances that conflict with the constitution or valid laws of the state. They have, in most states, no authority to make laws except as such authority has been granted to them by the state legislature itself.

Law compared with other rules

The difference between the term "law" as it is here used and other rules that we ordinarily observe is that law has back of it the element of governmental authority, whether that authority be national, state, or local. A simple illustration will make this clear. State laws and local ordinances, both falling within the term "law" as it is here used, require that vehicles turn to the right when meeting each other, and national laws contain definite provisions as to how vessels shall behave upon meeting each other upon navigable waters. All of these rules are subject to governmental enforcement, and are therefore law. There is, on the other hand, a rule of social custom that one shall turn to the right upon meeting another. As a matter merely of social custom this rule is not enforceable, and it has not seemed necessary

to put any governmental authority back of such a custom, although it has been necessary to do this with respect to a similar custom as to automobiles. If a person turns to the left rather than to the right upon meeting another, he may be put to some inconvenience, and if injured he may not be permitted to recover damages in court for his injury if the other party is able to show that, through violating a common social practice, the injured person was himself as a matter of fact really responsible, not because any law relieves one from responsibility for injuring another, but because the injured person has not shown reasonable and intelligent care in his behavior. A rule of social custom is likely to be enacted into law when its observance becomes of sufficient importance to require enforcement by governmental authority.

Laws enacted by legislative department

The legislative department is the body for the determination of new governmental policies through the enactment of law. Matters of social custom often reach a point where their enactment into law becomes necessary or desirable, because of the fact that governmental enforcement is essential in order to obtain general observance. The most active influence in producing the enactment of new laws by state legislatures within this country during the past fifty years has been the change in social, economic, and industrial conditions. This change has been brought about largely by the great development of large-scale factory industry, by the development of rapid transportation, and by the tendency of the larger portion of our population to congregate in cities. With respect to the safeguarding of labor in factories and mines, and with respect to almost all of the newer activities undertaken by government in this country, there is a great mass of state legislation. The development of new types of state legislation has kept pace with the development of new types of governmental activity. Indeed, the statement may be put the other way:

CHAP. I

new needs of the community have led to legislation, and to new types of governmental activity for the administration of such legislation. State legislatures now devote their time primarily to legislation made necessary by activities undertaken by government during the past fifty years.

New law and the courts

Legislative departments are not the only bodies that develop new rules of law. The basis of private law in all of the American states except Louisiana is the English common law. This law is a product of judicial decisions and is at all times alterable by legislation. So far as the common law is not altered by legislation, it is subject to constant change by judicial decisions themselves. Because of new social and economic conditions, issues present themselves to the courts which have not arisen before. The decision of such issues establishes a new rule for the future. Oftentimes new conditions will make the decisions of a former generation inapplicable to present needs, and the courts will change the law by gradually adjusting their opinions to the new needs. Thus the common law of each state is constantly being remolded by new judicial decisions.[1] Laws enacted by state legislative bodies are at the same time altering rules of common law, setting up new rules, and establishing new types of governmental activity. The body of the law remains largely the same, yet its rules and details are constantly shifting—in part by judicial action, in part by legislative action, and to some extent by constitutional changes. The laws that regulate the private relations of one individual to another are perhaps even now molded, in the main, by judicial action; those that relate to the activities of government are primarily statutory.

Forces that develop new law

Law, in a broad sense, is but the formal statement of governmental policy. Laws enacted by a legislative

[1] For a brilliant discussion of the manner in which judges develop new legal principles, see Benjamin N. Cardozo, *The Nature of the Judicial Process* (New Haven, 1921).

department are more direct expressions of governmental will, but law developed by judicial decisions is none the less an expression of that will. All the forces that go to make up our economic and social life influence the development of law.[1] A legal system, like government itself, is a product of history and will at any given time contain much that no longer fits present needs; but adjustment to new needs is constantly taking place, through legislative and judicial action. When law ceases to change, development in the community has ceased. Law, while it changes to meet new conditions, is also an influence in producing new conditions. Laws are frequently enacted to meet threatened or existing economic or social abuses. Such laws do not always correct the abuses at which they are aimed, but they often have an influence upon further social and economic development.

GOVERNMENT SUPPORTS ITSELF BY TAXATION

Nature of taxes

With the growth of new state activities the cost of state government has necessarily grown, and this has made necessary the obtaining of additional sources of state revenue. One of the essential characteristics of government is that it supports itself by taxation. Government is the only organization that may compel those under its authority to contribute toward its support. As we multiply the number of governments over us and the number of things they do, we at the same time increase the expense, and the taxes by which governments meet this expense.

Changes in form of taxation

Each of us, directly or indirectly, pays taxes for the support of government. Government in many cases performs certain services, for which we pay just as we would pay a private individual or company for the per-

[1] A. V. Dicey's *Law and Public Opinion in England in the Nineteenth Century* traces the influence of economic forces upon the development of English law. Unfortunately, there is no similar discussion of such influences in the United States.

CHAP. I

formance of the same services. The United States government, for example, requires us to pay for the carriage of each letter that we mail. With the changes that have taken place in the economic and social conditions of our states, changes have necessarily developed in methods of raising taxes, and we now have numerous types of taxation that did not exist fifty years ago. In the early history of our states, the chief source of revenue employed both for state and local purposes was a general property tax, based upon the assumption that all real and personal property could be treated alike for purposes of taxation. With the growth of new forms of property this type of tax system has been outgrown, and our constitutions and laws have gradually changed to meet the new situation.

POPULAR SHARE IN GOVERNMENT

The right to vote

There has been a steady expansion of the right to vote, although suffrage restrictions in the South present a partial contradiction of this statement. Some educational qualifications for voting exist. Some states have conferred the right to vote upon aliens who have declared their intention of becoming citizens, but the tendency now is to limit the suffrage to citizens. Even though restrictions in some cases exist, it is now substantially an accepted principle that the right to vote should be conferred upon all citizens of sufficient maturity. The age of twenty-one is regarded as evidence that such maturity has been acquired.

Reasons for suffrage extension

The extension of the suffrage has not been due to theory or principle alone. In the early history of American states, a broad frontier afforded an easy means of acquiring property, and the settlement of this frontier was naturally accompanied by a democratic movement leading to the establishment of universal male suffrage. The gradually developing economic independence of

women was the chief factor in the recent establishment of universal woman suffrage. Political changes are usually not produced by theories, but by the economic and social facts that lie back of the theories. Where changes are not supported by the economic and social facts, they fail. The Fifteenth Amendment to the constitution of the United States forbids discrimination on the ground of "race, color, or previous condition of servitude," but it has not prevented discrimination. The Nineteenth Amendment forbids discrimination on the ground of sex, and more completely accomplishes its purpose.

Changing types of political influences

Not only have social and economic factors occasioned an extension of the right to vote, but they have also altered the character of the citizen's share in his government. The telegraph and the newspaper have united to bring to the voter immediate knowledge of important governmental actions. News has been nationalized. Because of the more spectacular character of national issues, the citizen is, day by day, better informed regarding affairs in Washington than with respect to those at his state capital and in his local community. Rapid methods of transportation have an important bearing upon present methods of campaigning for office, and upon the development of the legislative lobby. Groups in each state having similar economic interests are so organized as to bring pressure upon government for the advancement of such interests. Such group organizations are often ostensibly non-political in character, yet they have a strong influence upon political parties and governmental bodies. In some cases these influences are nationally or internationally organized. Many questions must be settled within specific state lines, because the power to settle them lies in the states; but the influences that determine the character of state action are not necessarily limited to the boundaries of the state.

CHAP. I

Government a social agency

In this chapter an effort has been made to outline the essential characteristics of government, and to indicate the manner in which, with respect to these essentials, the functions and organization of government change with the needs of the communities served by government. The important point sought to be made is that government is a means for the performance of certain social functions. It changes its functions, its organization, its laws, and its means of support with changes in the condition of the community that it serves. The activities and needs of state government vary, and will continue to vary, with social and economic changes in the forty-eight states. A fundamental basis of government and law in this country is the private ownership of property; but institutions and the control over institutions are not now the same as when the ownership of real property was more readily attainable by each citizen.

Government a fundamental organization

While government changes its activities and organization with changing needs, it is not merely an institution to serve its citizens, as a bank or a bakery is an institution to serve its customers. Government serves its citizens, and should serve them efficiently, but it is a fundamental social institution as well. It is a part of each of us, and we a part of it. Government can be no more efficient than its citizens make it.

NOTE TO CHAPTER I

In order to obtain a precise view of government, it will be well to make a list of the services that government renders to you, and of the return you make for such services in taxes or direct payments. Compare the services rendered in an industrial state with those in a rural state; and in a thickly settled urban community with those in a rural community. It will be equally fruitful to compare what your state government does now with what it did fifty years ago, taking into account the relative expense and relative number of state employees at the two times.

The changing of law to meet new conditions may be studied for

England in Dicey, *Law and Public Opinion in England in the Nineteenth Century*. Illustrations of this change may be found in the development of each state. For example, the law of all states as to married women's property rights has changed; and this change is not difficult to trace for a single state. It is easy also to trace the more recent development of workmen's compensation laws in any one state. In a number of the states it is easily possible to trace in laws and judicial decisions the transition from cattle-raising to agriculture, by studying the development of the rules regarding the running at large of animals.

CHAPTER II

THE NATION AND THE STATES

THE CHARACTER OF THE AMERICAN FEDERAL SYSTEM

The federal system

THE national government and the states exercise jurisdiction over the same territory, under a federal form of organization. By the terms of the national constitution the states have a definite share as states in the organization and government of the nation, and the distribution of powers between state and nation is determined by the terms of the national constitution. The states exercise a portion of the power of internal government, but are relieved from the problems of foreign relations and external defense.

Guaranty of existing state boundaries

The constitution of the United States recognizes and guarantees the integrity of state boundaries by providing that "no new state shall be formed or erected within the jurisdiction of any other state; nor any state be formed by the junction of two or more states, or parts of states, without the consent of the legislatures of the states concerned as well as of the Congress."

Boundaries of new states

The constitution of the United States expressly provides that "new states may be admitted by Congress into this union"; and in prescribing conditions for admission the national government may determine the boundaries of new states as it sees fit. No territory has ever been forced into statehood, however, and the practice has always been followed of leaving to a territory the determination of whether it would or would not seek admission as a state under the conditions prescribed by Congress. In a number of cases territories have

sought readjustments of their boundaries before admission. For a long time there was consideration by the national government of the union of Arizona and New Mexico for the purpose of forming one state, but local opposition was largely responsible for the final admission of the territories as two states. Once a state is admitted, however, its boundaries can not be changed without its consent.

Equality of states

In powers and in senatorial representation the states are equal. Some temporary inequality of powers may be imposed as a condition of admission into the union, but not as a direct national limitation upon the states, once they become members of the union. In the admission of Oklahoma, the enabling act of Congress forbade the removal of the capital of the state from Guthrie to any other place for five years after admission, and required that the constitutional convention of Oklahoma irrevocably accept the terms of this enabling act. The terms of the enabling act were accepted by the convention, but were not embodied in the state constitution. The state actually moved its capital within the five years, and the issue as to power to remove came before the United States Supreme Court in the case of Coyle *v.* Smith.[1] The court in this case said that the union is one of equal states whose constitutional powers can not be restrained by the terms of admission, and within whose territory the power of Congress can not be enlarged beyond that expressed in the constitution of the United States. The court said:

"There is to be found no sanction for the contention that any state may be constitutionally deprived of any of the power constitutionally possessed by other states as states, by reason of the terms in which the acts admitting them to the union have been framed."

[1] 221 U. S. 559 (1911). For a full discussion of this issue with respect to Oklahoma, see Julien C. Monnet, "Violation by a State of the Conditions of Its Enabling Act," *Columbia Law Review*, X, 591-607 (1910).

CHAP. II

Temporary restrictions imposed as conditions of admission

The enabling acts for the admission of Utah (1894) and Arizona and New Mexico (1909) required that these territories agree to certain conditions for admission, and also required that they place these conditions in their state constitutions. In the case of New Mexico, where certain guaranties were thought highly desirable, the enabling act required that an ordinance embodying a number of conditions "be made a part of any constitution that shall be formed hereunder, in such terms as shall positively preclude the making by any future constitutional amendment of any change or abrogation of the said ordinance in whole or in part without the consent of Congress." No judicial decision has been rendered as to this method of continuing certain federal restrictions within a state after the state has been admitted to the union; but the issue is probably not of great importance, because of the exhaustion of further contiguous territory from which new states may be formed. With respect to New Mexico and Arizona the national congress accomplished the purpose aimed at in the case of Oklahoma, by requiring the new states to place limitations upon themselves as a condition of admission. After Arizona had framed her constitution and first sought admission, a further condition was imposed that provision for the recall of judges should be omitted from the constitution. No requirement was made that Arizona should limit herself against replacing such a provision in the state constitution. Arizona omitted the provision from her constitution, obtained admission into the union, and at once, by amendment, placed the recall of judges back into her constitution, as was her full constitutional right.

Equal powers

All states have equal powers within their borders, except in the few cases where states have been required to limit themselves through constitutional provisions in order to obtain admission into the union. Even these limitations, if valid, are enforceable because self-im-

posed and not as limitations upon the states as units in the national system. In some earlier cases it was urged that the ordinance of 1787 constitutes a limitation upon the powers of the states created out of the old Northwest Territory, in addition to the limitations contained in the constitution of the United States. The United States Supreme Court, however, has said that this ordinance "ceased to be obligatory upon such states from and after their admission into the union as states, except in so far as adopted by such states and made a part of the laws thereof."[1]

States not politically equal

Although each state possesses equal powers within its own borders, the political powers of states vary to a large extent in proportion to their population and wealth. An inequality in political power is recognized through the giving of greater weight to population in the composition of the federal House of Representatives, and in the election of president and vice-president.

Republican form of state government

The states, once admitted, have full power to determine their own organization of government, subject to the limitation that "the United States shall guarantee to every state in this union a republican form of government, and shall protect each of them against invasion; and upon application of the legislature, or of the executive (when the legislature can not be convened) against domestic violence." The limitation regarding a republican form of government has never proved a serious restriction upon the types of government which states have desired to set up, and is not likely to prove a restriction in future. This restriction is not enforceable by the courts, but is a political guaranty whose application is confined to the political departments of the national government. Some years ago there was much discussion of the issue as to whether the adoption of the initiative and referendum by states violated the provision of the federal constitution regarding a republican form of gov-

[1] Cincinnati *v.* L. & N. R. R. Co., 223 U. S. 390 (1912).

CHAP. II

ernment. This issue came before the United States Supreme Court in the case of the Pacific States Telephone & Telegraph Company *v.* State of Oregon,[1] and the court declined to take jurisdiction on the ground that "the issues presented, in their very essence, are and have long since by this court been, definitely determined, to be political and governmental, and embraced within the scope of the powers conferred upon Congress, and not therefore within the reach of judicial power." The continued admission of representatives to the House and Senate of the United States from states that have adopted the initiative and referendum appears to constitute a full determination by the political organs of the nation that these states have not departed from the republican form of government.

States are part of a larger government

The states under our federal system are units in the formation of a nation, not governments independent of a nation. Before the Civil War a number of conflicts arose between national and state power, in which first one group of states and then another asserted its authority to proceed independently of the nation. The Civil War settled finally and conclusively that the states are merely units, although indispensable units, in the formation of a single national organization. The judgment of arms in this particular was after the cessation of war summed up by Chief Justice Chase in the case of Texas *v.* White:[2]

"The constitution in all its provisions looks to an indestructible union, composed of indestructible states. When, therefore, Texas became one of the United States, she entered into an indissoluble relation. All the obligations of perpetual union, and all the guaranties of republican government in the union, attached at once to the state. The act which consummated her admission into the union was something more than a compact: it

[1] 223 U. S. 118 (1912).
[2] 7 Wall. 700 (1869).

was the incorporation of a new member into the political body. And it was final."

A national union

The limitations imposed upon the states by the constitution of the United States clearly indicate the purpose to establish a single national organization, with the states as units in that organization. States are forbidden, without the consent of Congress, "to keep troops or ships of war in time of peace, enter into any agreement or compact with another state or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay." They are forbidden to enter into treaties, alliances, or confederations. These types of limitations upon the states indicate a definite purpose to deprive the states of any independent existence as organizations in themselves, and this purpose is clearly supported by the language making the "constitution, and the laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States," the supreme law of the land. The Civil War settled once for all that this is a nation, and that the states as such are permanently coördinated units in the organization of this nation. The Fourteenth Amendment to the national constitution, adopted as a direct result of the Civil War, made this more certain by establishing citizenship upon a national basis.

States formed from national domain

Since the adoption by the Continental Congress of the Ordinance of 1787, it has been the policy of this nation that its contiguous territory should as rapidly as possible be admitted to statehood. The thirteen original states became members of the federal union by adopting the constitution of the United States. Vermont became a state in 1791 by the consent of Massachusetts, New Hampshire, and New York, all of which claimed portions of the territory whose inhabitants had in 1777 organized an independent state. Kentucky formed a portion of the domain belonging to the state

CHAP. II

of Virginia and not ceded to the national government, and became a state in 1792, with Virginia's consent. Maine became a state in 1819 through the consent of Massachusetts, of whose territory she had previously formed a part. Texas was an independent republic which voluntarily sought admission to the union, and became a member state of the United States in 1845. West Virginia was formed from the portion of Virginia whose population refused to secede from the Union in 1861. The consent of Virginia as a state was really never obtained, but the national government recognized the consent granted by a loyal government which claimed to be the legal government of Virginia, and admitted West Virginia as a state in 1863. All of the other thirty states that form the American union were created from the national domain.

SHARE OF STATES IN THE GOVERNMENT OF THE NATION

States in the federal system

Under the federal principle in the United States, the states, as such, are recognized in several ways. They have equal representation in the United States Senate. They are treated as units in the election of President and Vice-President. They have a decisive influence in the amendment of the constitution of the United States.

United States Senate

When this government was being formed, a sharp conflict of interests arose between the small states and the large states. The smaller states contended for complete equality among the states in the organization of the national government, and the larger states contended for influence in proportion to population. A compromise was reached by which the states are equally represented in the United States Senate irrespective of population, and in proportion to their population in the House of Representatives. By the terms of the constitution no state may without its consent be deprived of its "equal suffrage in the Senate." Until 1913 the sena-

tors from the several states were chosen by the legislative bodies of these states, though a number of states had devised schemes resulting in effect in direct popular election. The Seventeenth Amendment provides for direct popular election, and that vacancies shall be filled by election, but the legislature of any state may empower the state executive to make temporary appointments until the people fill the vacancy.

The national House

Representation in the national House of Representatives is based upon population. Each ten years, after the decennial federal census, the Congress of the United States determines how many members will constitute the House of Representatives. This number is then divided into the total population of the forty-eight states. In this manner a ratio of representation is obtained. Each state is entitled to as many representatives as this ratio is contained in its population, although each state, no matter how small its population, is entitled to at least one representative. After the division of the representative ratio into the population of each of the states, large fractions of population will remain; and the states having the largest remainders receive additional representatives, as long as the number agreed upon is not exceeded. The Fourteenth Amendment provides that "when the right to vote at any election for the choice of electors for president and vice-president of the United States, representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state." Although the enforcement of this provision has frequently been

CHAP. II

discussed in the two houses of Congress, the provision has never been applied. If applied, the provision would result in a loss of representation by the southern states, whose colored population to a large extent does not vote, and also a loss of representation by all of the other states that restrict adult male voting by educational or other tests.

Federal representatives elected from districts

Federal law requires that the legislatures of the several states shall divide the state's territory into as many districts as there are representatives to be elected, and imposes general restrictions that such districts shall be composed of compact and contiguous territory with a population equaling as nearly as possible that of each other district within the state. The state legislatures have not always promptly redistricted their states immediately after a federal reapportionment; and often for long periods additional representatives allotted to a state are elected from the state at large. In Illinois, for example, two additional representatives were allotted by the federal reapportionment of 1911, but no redistricting of the state took place during the succeeding ten years. States have a pride in not having their representation in the national House of Representatives reduced, even though they have not increased in population as rapidly as the other states, and for this reason the number of members of the national House of Representatives has been steadily increased.

The electoral college

In the election of the president and vice-president of the United States, the framers of the national constitution provided for so-called electoral colleges. Each state chooses a number of presidential electors equal to the number of its members in the national House of Representatives, plus its two senators. The original notion was that these electors should actually exercise a choice as to who should be President. However, almost since the beginning of our government, candidates for the presidency and vice-presidency have been nomi-

nated by the great political parties of the country in advance of the choice of electors. These great political parties also nominate within each state their candidates for presidential electors. The candidates of any party for electors are definitely pledged in advance to vote for the candidates nominated by that party for president and vice-president. There is virtually no possibility that the electors who are chosen will vote for any one else than the candidates who have been nominated by their own party. For this reason, everybody knows who will be president immediately after the November election at which the electors themselves are chosen; though a president is not elected until the votes of the electors have been cast in accordance with the constitution of the United States. We have just as clearly a direct election of the president and vice-president of the United States in the November election as if we did not use presidential electors. However, if the president and vice-president of the United States were popularly elected by all of the people of the country, the result would occasionally be different from that at the present time. The president and vice-president are now chosen by a majority of the presidential electors, and the electors are chosen by a majority or plurality vote of the people in each of forty-eight separate states. A majority of the presidential electors may be elected by one party, although that party may actually not have either a majority or a plurality of the votes of the whole country. In several cases a candidate for the presidency of the United States has been elected, although an opposing candidate had a larger popular vote throughout the country as a whole.

Importance of nominating methods

In view of the manner in which we actually choose the president and vice-president of the United States, the machinery by which the great parties nominate their candidates for the presidency and vice-presidency becomes really the most important matter in the election

CHAP. II

of these officers; for the voter in the November election of presidential years ordinarily has no power except that of choosing between the candidates of the two chief parties. Occasionally it happens, as in 1912, that there are three parties contending with one another, for each of whose candidates there is a real possibility of election.

Presidential primaries

A number of states have provided for so-called presidential preference primaries, at which the voters of the several parties within the state may vote their preference as to the candidates to be nominated for president of the United States by the national conventions of their parties. This plan has not proved satisfactory, because many states are likely to endorse so-called "favorite sons" who have no possible chance of a nomination. When the results of the primaries in the different states are assembled, they really do not indicate to any great extent the actual sentiment of the voters of the country as to who shall be nominated by their parties, and therefore have little influence upon the nominating conventions.[1]

National nominating conventions

The great political parties nominate candidates in national nominating conventions, which usually meet in June or July preceding the November election for the choice of presidential electors. These conventions are made up of delegates chosen either by primary elections or by party conventions in the states. In the Democratic conventions each state is represented by a number of delegates equal to twice the number of the state's combined representation in the Senate and House of Representatives of the United States. In the national Republican convention the representation of the states in the two houses of Congress is taken as a basis, but reductions are made in the number of delegates from

[1] For recent discussions of presidential primaries, see an article by Professor Charles E. Merriam, *Journal of the American Bar Association*, VII, 79-85 (1921); R. S. Boots, "The Presidential Primary," *National Municipal Review*, Sept., 1920 (Supplement).

states having small Republican votes. The states may, however, properly be regarded as units in the machinery for nominating party candidates.

Choice of president if electoral college fails to elect

If no candidate for the presidency obtains the votes of a majority of the presidential electors, then the House of Representatives chooses a president from among the three having the highest votes. In choosing a president, each state has but one vote in the House of Representatives, and a majority of the states is necessary to a choice. If no candidate for the vice-presidency obtains the votes of a majority of the presidential electors, the United States Senate chooses from among the two highest candidates. When the constitution was adopted, it was assumed that the occasion would frequently present itself in which the president and vice-president would be chosen by the House and Senate from among the leading candidates, and this was regarded as a recognition of equal political power of states in the national union.

Amending the federal constitution

Two methods are provided for amending the constitution of the United States, and in both of these methods the states have the decisive influence. An amendment may be proposed by two thirds of the members of both houses of Congress, and goes into effect when ratified by the legislatures of three fourths of the states, or by conventions in three fourths of the states, as Congress shall determine. Congress is required by the constitution to call a convention for proposing amendments, on the application of the legislatures of two thirds of the several states. No convention has ever been called, and Congress has always provided for the ratification of federal amendments by state legislatures rather than by conventions called for this purpose. The machinery employed in the adoption of all the nineteen amendments to the constitution of the United States is (1) proposal by two thirds of both houses of Congress, and (2) ratification by the legislatures of three fourths of the states.

CHAP. II

Influence of states in amending process

In the machinery for amending the federal constitution, there is a definite control by the states as such. Thirteen of the smaller states may defeat an amendment to the constitution by the failure of their legislatures to ratify. In this manner a small group of states as units, independently of their size or population, may exercise a decisive influence in preventing changes in the national form of government or in the powers of the national government. Not only this, but, in order to be proposed to the states, a constitutional amendment must receive two thirds of the votes in each house of Congress. If the sentiment of more than one third of the senators is against a proposed amendment, this amendment can not be submitted. It is also of importance to bear in mind that two thirds of the members of the House of Representatives (representing substantially two thirds of the population of the country) must also agree in order to submit an amendment to the states, and that three fourths of the states must ratify it. Thus, no amendment to the national constitution can be made without the agreement of much the greater part of the population of the country. In this manner the states as governing bodies, and also the population of the country, are united in the amending process; and both must agree in order to bring about constitutional change. In the amending of the national constitution, no line of division has ever arisen between the large and the small states.[1]

Decreased importance of states as political units in national system

The states as units still have a decisive influence with respect to any change in the national constitution. In other respects, so far as they influence the organization and government of the nation, they have tended to become merely larger units for national election purposes. The state has to a large extent lost its political individuality as a unit in the government of the na-

[1] A full review of the procedure in amending the constitution of the United States will be found in W. F. Dodd, "Amending the Federal Constitution," *Yale Law Journal*, XXX, 321-354 (1921).

tional system; although, of course, its governmental autonomy and its powers within its own border remain. The decreased political importance of the state as a unit in national affairs is due perhaps, first of all, to the development of rapid means of travel and of communication. The constant shifting of population from one state to another has prevented the newer states from developing anything like the solidarity possessed by the original thirteen, and the very increase in the number of states has reduced the importance of each as a unit in the national government.

Reasons for decline of states in importance as national units

Not only this, but, since the establishment of our federal system, national politics has dominated. The ambitious political leader looks to advancement from state to national office. Nominations for the presidency are the most conspicuous prizes in our political organization. The popular election of United States senators by each state under the Seventeenth Amendment has itself tended to reduce emphasis upon the state as a political unit, and to treat it as merely an electoral area in the organization of the national government.[1] As soon as national and state elections came to be held upon the same day, we had a full establishment of the dominance of national politics. The state as a political organization has ceased to have the importance of an earlier day, when a chief justice of the United States could resign to accept the governorship of a state. This change in the political position of the state in the American union has, of course, been bound up with the increased exercise of national powers and the increased importance in other respects of the national government.

[1] The Fifteenth and to a greater extent the Nineteenth amendments have to a large extent withdrawn from the states the control of the right to vote for state offices.

CHAP. II

NATIONAL POWERS AND THE STATES [1]

National powers found in a written constitution

With two governmental bodies exercising authority over the same territory, it is necessary to have some general principle as to the distribution of powers between these governments. The national government has only the powers granted to it by the constitution of the United States; and the Tenth Amendment, adopted in 1791, expressly provides that "the powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people." The states gave up certain powers in establishing the national government, but expressly retained to themselves or to the people all other powers. The national government is a government of limited powers, possessing only such as are expressly granted by the constitution and those incident to the powers so granted. The constitution of the United States grants a number of important powers to Congress, and to the other departments of the national government in broad terms, and further empowers Congress "to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States, or in any department or officer thereof."

Powers finally construed by United States Supreme Court

All of the powers belonging to the national government, must, therefore, be found within the terms of the constitution of the United States. The constitution of the United States and the powers exercised thereunder are expressly made the supreme law of the land, "and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." We have, therefore, the principle that the powers of the national government are limited powers, found within the terms of a written document, but

[1] The best general discussion of this subject is W. W. Willoughby, *The American Constitutional System* (New York, 1904).

superior in all cases to the powers of the states. How and by whom shall the extent of these powers be determined? Since the decision of the United States Supreme Court in the case of Martin *v.* Hunter's Lessee, in 1816,[1] the principle has been established that the line between national and state powers is one to be drawn by the United States Supreme Court, an organ of the national government itself. Before the Civil War there were numerous conflicts between national and state powers, and numerous efforts to settle the respective powers of state and nation in the political arena; but the United States Supreme Court is now fully recognized as the body to pass finally upon such issues. This tribunal, as an organ of the national government familiar with the needs and problems of that government, has naturally throughout substantially the whole course of its history been favorable to constructions supporting national powers.

Broad construction of powers

The constitutional law of the United States deals primarily with powers of the national government. The function of preserving a balance between national and state powers has been the most important single function in our federal system, and on the whole this function has been well performed by the United States Supreme Court. Into its performance has gone not only legal ability but also real statesmanship. Under the chief justiceship of John Marshall the United States Supreme Court construed national powers broadly and liberally. The case of McCulloch *v.* Maryland[2] in 1819 upholding the validity of the Second United States Bank, laid great emphasis upon the clause regarding necessary and proper powers. The doctrine of implied powers under the necessary and proper clause has been an important one in broadening the scope of national powers. Perhaps the clearest illustration of this application is

[1] 1 Wheat., 304 (1816).
[2] 4 Wheat., 316.

CHAP. II

found in the case of *Ex parte* Garnett,[1] where a grant to the federal courts of authority "in all cases of admiralty and maritime jurisdiction" was said to vest power over the same subject in the national legislature. The broad construction of national powers laid down by the United States Supreme Court under Chief Justice Marshall has not been materially weakened by his successors. The emphasis upon broad national powers has been a consistent one throughout our constitutional history. The period of Taney's chief justiceship (1836-64) has frequently been spoken of as one in which a narrow view was taken of national powers; but, though numerous dicta in this period asserted narrow views, there is little of actual decision to this effect. Some important cases during this period did relax an unnecessary strictness in interpreting national limitations upon state actions; but these cases did not narrow national powers. They made it possible for the states to exercise powers in fields where the national government was not yet ready to act. In fact, one of the great extensions of national power, that of federal admiralty jurisdiction over all navigable waters, came under Taney's chief justiceship, by a reversal of the court's position under Chief Justice Marshall.[2] The United States Supreme Court is an organ of the national government, associated with that government, and has in the long run shown a disposition to broaden national powers.

Superiority of national powers

The more important powers with respect to interstate commerce, taxation, the making of treaties, the establishment of post offices and post roads, and maritime jurisdiction, have been construed broadly as granting extensive powers to the national government; and this broad construction has proceeded almost without exception. For a time the view seemed likely to be

[1] 141 U. S. 1 (1891).
[2] Genesee Chief V. Fitzhugh, 12 How. 443 (1851).

adopted in American constitutional law that the states have reserved to themselves a definite residue of power which limits the power of the national government. Under this view a power granted to the national government, without reservation, to regulate interstate commerce would have been held not a complete power over this matter, but a power to be exercised only in so far as it did not trench upon an equal state power to regulate domestic commerce. This view has been expressly rejected by the United States Supreme Court. The powers vested in the national government are not limited by any reserved powers in the states. Under the doctrine of the superiority of national powers, federal regulations replace any conflicting state regulations that interfere with their full application. "There is no room in our scheme of government for the assertion of state powers in hostility to the authorized exercise of federal power."[1] For example: the Congress of the United States, under the power to regulate interstate commerce, has full authority to specify types of safety appliances to be employed upon railroads engaged in such commerce; but railroads engaged in interstate commerce also engage in domestic commerce, and a train carrying articles of interstate commerce may be composed of some cars employed for interstate commerce and of other cars employed for purely domestic commerce within the boundaries of a single state. The United States Supreme Court has, therefore, taken the view[2] that Congress may require safety appliances upon all cars used by a railroad engaged in interstate commerce, "not because Congress possesses any power to regulate intrastate commerce as such, but because its power to regulate interstate commerce is plenary and competently may be exerted to secure the safety of the persons and

[1] Simpson *v.* Shepard, 230 U. S. 352, p. 399.
[2] Southern Railway *v.* United States, 222 U. S. 20 (1911).

CHAP. II

property transported therein, and of those who are employed in such transportation, no matter what may be the source of the dangers which threaten it."

Federal regulation of railroad rates

Congress by the Transportation Act of 1920 authorized the Interstate Commerce Commission after investigation to remove unreasonable discriminations as between intrastate and interstate commerce. Acting under this authority, the commission fixed a minimum passenger rate for the state of Wisconsin of 3.6 cents per mile per passenger. This action was upheld by the United States Supreme Court on the ground that purely intrastate rates must yield their proper proportion of returns. Through Chief Justice Taft the court said "that such orders as to intrastate traffic are merely incidental to the regulation of interstate commerce and necessary to its efficiency. Effective control of the one must embrace some control of the other, in view of the blending of both in actual operation. The same rails and the same cars carry both. The same men conduct them. Commerce is a unit and does not regard state lines, and while, under the constitution, interstate and intrastate commerce are ordinarily subject to regulation by different sovereignties, yet when they are so mingled together that the supreme authority, the nation, can not exercise complete, effective control over interstate commerce without incidental regulation of intrastate commerce, such incidental regulation is not an invasion of state authority."[1] In this case state power over purely local commerce is substantially superseded through the exercise of national authority over interstate commerce.

National authority replaces that of state

The use of the superior national powers of regulation may therefore, in order to deal effectively with the matters under the control of Congress, actually control and regulate many matters that otherwise would be subject merely to state regulation. The national government

[1] Railroad Commission of Wisconsin *v.* C. B. & Q. R. R. Co., U. S. S. C. Advance Sheets, 1921-22, p. 236.

not merely has a control over that part of commerce which is purely interstate, but also may extend its authority to regulate and to control any actions, local or otherwise, which may affect that commerce. In this manner every material extension of national regulatory power not merely regulates and controls the matters directly subject to congressional authority, but also regulates and controls matters that otherwise would have been subject to state authority.

Expansion of national authority

The extension of the powers of the national government has been partly through a broad construction of the provisions of the constitution of the United States, partly through amendments to that constitution, and partly through an increased exercise by the national government of powers that have always been recognized as properly belonging to it. When the constitution of the United States was framed, means of transportation and communication were slow and difficult. Adjoining states were then farther from each other in point of time than are now the Atlantic and the Pacific. With the development of rapid means of communication and transportation, commerce among the states has enormously increased, as have substantially all of the transactions properly regulated by the national government. The substitution of railroads for wagons as a means of transportation enormously increased the actual powers of Congress by enormously increasing the mass of interstate commerce. The powers granted to the national government over interstate commerce were not limited to the means of transportation and commerce employed in 1787. This view may be best stated in the eloquent language of Chief Justice Waite:

"The powers thus granted are not confined to the instrumentalities of commerce or the postal service known or in use when the constitution was adopted, but they keep pace with the progress of the country, and adapt themselves to the new developments of time and

CHAP. II

circumstances. They extend from the horse with its rider to the stage-coach, from the sailing-vessel to the steamboat, from the coach and the steamboat to the railroad, and from the railroad to the telegraph, as these new agencies are successively brought into use to meet the demands of increasing population and wealth."[1]

Economic reasons for expansion of national power

The very logic of economic development in this country has forced an increased exercise of national powers. This logic of facts has also had its influence in helping the United States Supreme Court take a broader view of national powers. The first and second United States banks, operated by the national government during the earlier period of its history, had a great influence upon financial conditions in the country and were objected to as serious encroachments upon state powers. Now we have an elaborate system of national banks, with the whole banking organization of the country, state and national, dominated by a federal reserve system. We also have farm loan banks and postal savings banks. The national government, under its commerce power, regulates in some detail the method of conducting the great mass of commercial transactions of the country. Under the treaty-making power, the national government protects migratory birds, and under the taxing power it regulates some activities within the states. Where a problem such as that of railroad regulation is clearly and properly national in character, it will by some method come to be dealt with by the national government, and ways will be found to accomplish this result.[2]

[1] Pensacola Telegraph Co. *v.* Western Union Telegraph Co., 96 U. S. 1 (1878).

[2] There have been some exceptions to the statement that the United States Supreme Court has been favorable to national power. The Income Tax Case of 1895 (Pollock *v.* Farmers' Loan and Trust Co., 157 U. S. 429; 158 U. S. 601) involved a construction unfavorable to national power, which was overcome by constitutional amendment. The most recent case of unfavorable construction is the decision of the court against the federal child-labor law. In this case the court held that the federal taxing power could not be employed to destroy the use of child labor in the states. The Child Labor Case and the Future Trading Act Case, both decided May 15, 1922, do not improperly limit national power, but decide

Grant of money to the states

The national government has in recent years found a new way of extending its powers. The national income tax amendment, adopted in 1913, not only gave the national government a new source of revenue, but has enabled it through this new source of revenue to appropriate increasing amounts of money to the states for specific governmental purposes. In agricultural and vocational education, in highway construction, and more recently with respect to maternity and infant welfare, the nation is appropriating vast sums of money to the states, subject to the condition that the states shall also make certain appropriations for the same purposes, and further subject to federally imposed restrictions as to the policy to be employed in the expenditure of the money.[1] The states are always willing to obtain added funds, and in order to do so consent to conditions involving the transfer of control of policy from the state to the nation.

National government enforces its own law

The chief weakness of the Articles of Confederation was that they sought to act through the governments of the several states alone and not directly upon the citizens of the states. Government under the confederation was ineffective if all of the states did not enforce its orders. When a national government was formed under the constitution of 1787, that government, had it thought proper, might have sought to use the states (each within its own borders) as agencies for the enforcement of national law. Such a plan would of course have involved a dependence of the nation upon the several state governments, and would have presented again the evils of the confederation (1781-89) each time a state gov-

that the national government will not be permitted, under the ill-concealed guise of taxation, to exercise powers which it does not otherwise possess. If an exercise of power is not a tax, but merely an attempt to regulate, calling it a tax cannot enlarge national powers. To decide otherwise would permit the destruction of state powers.

[1] See Paul H. Douglas, "A System of Federal Grants-in-Aid," *Political Science Quarterly*, XXXV, 255-271, 522-544 (1920). The Sheppard-Towner Act for maternity and infant welfare was approved November 23, 1921.

CHAP. II

ernment disagreed with national policy. For this reason the national government from the beginning built up its own independent administrative organization for the purpose of enforcing its law throughout the territory of the nation. Judges of state courts are bound by the constitution and laws of the United States; but for the enforcement of federal law and federal policy there is a complete federal system of courts and of administrative organization. Throughout the territory of each state two organized governments operate, each with its independent administrative organization, the national power under the constitution of the United States being the superior power in case of conflict. The scope of the judicial and administrative organization of the nation has steadily grown with the expansion of the things to be done by the national government through this organization. The nation is now strong and effective, and can more readily use the states as its agents than in the earlier days of constant conflict between state and national powers. During the recent World War the states were employed as national agencies in the administration of the Selective Service Act.

Territorial areas of nation

With a country as large as the United States the national government can not conduct its affairs entirely from Washington as a single center. It must necessarily to some extent divide the country into districts or zones for the conduct of governmental business, and maintain offices in numerous places. State lines do not constitute economic or social barriers, so that the territory of the states can not serve as the local areas for many governmental tasks. Not only this, but the national government could not organize and supervise its activities effectively if each of the forty-eight states constituted a distinct area for this purpose. The federal courts are to a large extent organized upon the basis of independent state lines, but federal law has provided larger districts, usually composed of groups of

states, for administering the federal reserve system and for other purposes.

National government acts directly upon the individual

The national government has come to a greater and greater extent to act upon the individuals throughout the country. The post office was always a nationalizing influence, because of bringing citizens of the whole country into touch with an agency of the national government, as well as because of the facility it furnished for easy means of communication. The income tax amendment and the income tax law enacted thereunder have brought the United States government into close personal relationship with a large part of the people of the country. The Eighteenth Amendment has also brought about a close relationship between the national government and the individual through the building up of a national organization for prohibition enforcement. Every great function undertaken by the national government which brings that government into close relationship with the mass of the population of the country has a nationalizing influence. The recent World War, bringing with it as it did a detailed supervision over almost all of the individual activities of the citizen, was a nationalizing influence in this respect, as well as because of the fact that it united the country in a great task of patriotic endeavor. War always extends national powers, and both during the Civil War and the recent World War the powers of the national government were in many respects exercised without complete regard for constitutional guaranties.[1]

Increased work of the state

Reference has already been made to the decreased political importance of the states as units in our gov-

[1] The United States Supreme Court has said: "The constitution of the United States is a law for rulers and people, equally in war and in peace, and covers with its shield of protection all classes of men, at all times, and under all circumstances. No doctrine involving more pernicious consequences was ever invented by the wit of man than that any of its provisions can be suspended during any of the great exigencies of government"; but this statement was not made during the progress of war. *Ex parte* Milligan, 4 Wall 2 (1866).

CHAP. II

ernmental organization. The nation and the states can not be equally important from a political standpoint, and it is natural that the nation should have taken the more important place. But with the increase in importance of national activities there has come an increase in the importance of things remaining to be done by the state. State governments do more work now than they ever did before, and they are thus more than compensated for the loss in political position and in the powers taken over by the nation.

Coöperation of national and state governments

The national and state governments, operating as they do over the same territory and dealing in many respects with the same things, must necessarily establish coöperation in the performance of their tasks. With respect to interstate commerce, for example, the national government to a large extent directly regulates many concerns of purely domestic commerce because their regulation is necessary or incident to the exercise of federal power. Interstate commerce and purely domestic commerce within a state are not easily separable. The national government has a complete organization for the inspection of meat that is shipped from one state to another or from this country to foreign countries. Many of the state governments have organizations for the inspection of meat slaughtered within their borders and to be used by their own people. The two organizations must necessarily work closely together. The meat inspection service under the control of the national government will to a large extent protect the quality of meat to be slaughtered and used within the state, because of the impossibility of distinguishing interstate and domestic operations of slaughter-houses and packing plants. In the control of plant diseases and plant pests, in the quarantine of cattle, and with respect to a great many other matters, the two governments necessarily establish close relationships.

Militia

In the organization of the militia the constitution itself provides for coöperation by empowering Congress "to provide for organizing, arming, and disciplining the militia, and for governing such parts of them as may be employed in the service of the United States, reserving to the states respectively the appointment of the officers and the authority of training the militia according to the discipline prescribed by Congress." Congress in this respect has gradually assumed a greater and greater authority, and has thus reduced the powers that the states may exercise.

Sphere of the state

The states remain essential units in the organization of the federal government, with important functions and with more actual governmental work to do than ever before. Their preservation is important from the point of view not merely of the states themselves, but from that of the national government as well. The extension of national authority under the constitution of the United States, as construed by the United States Supreme Court, has involved no serious danger to the existence of states and to the exercise of their proper powers. However, the existence of the states in the independent exercise of their proper functions is endangered by the increase of national subsidies, because here there is no limit to the extension of federal power except the limitation of the resources of the national government. The state's desire for additional funds can usually be relied upon to obtain consent to a national control over matters that in many respects should be left to the determination of the states themselves. However, national subsidies may be wisely employed for some purposes; and particularly to promote more effective interstate relations in certain cases. The states have served and should continue to serve an important purpose as organs for the more detailed work of government, subject to a closer supervision by the people who are being governed.

CHAP. II

They should also serve as laboratories for the working out of new governmental projects, and for the training of leaders who may find a larger place but perhaps not a larger usefulness in the national government.

INTERSTATE RELATIONS

Controversies between states

The states may have, and in numerous cases have had, disagreements with one another over boundaries and other matters. The constitution of the United States gives to the Supreme Court jurisdiction over controversies between two or more states, and expressly forbids the states to engage in war or to possess armaments that may lead to war. In deciding controversies between states, as in the case of the recent controversy between Virginia and West Virginia over the apportionment of the Virginia state debt, the United States Supreme Court exercises authority in some respects comparable with that of an international court. But this analogy may be easily carried too far, because the states have no position independent of the national union, and the United States Supreme Court has authority to carry into effect the judgments it may render.[1]

Constitutional regulation of relations between states

The constitution of the United States imposes certain restrictions upon the states in their relations with one another. Commercial barriers may not be imposed by one state against another, and the citizens of each state are expressly entitled to "all privileges and immunities of citizens in the several states." Persons accused of crime, who flee from justice, are required to be delivered up to the state having jurisdiction of the crime. Each state is required to give full faith and credit to the public acts, records, and judicial proceedings of every other state. Without certain constitutionally prescribed rules of conduct, conflicts and difficulties would constantly arise among the several states.

[1] See James Brown Scott, *The United States of America: A Study in International Organization* (New York, 1920).

Diversity of state law

State lines do not constitute economic and social boundaries. Although the result of historical development, they are in fact artificial lines. Yet within its own boundaries each state determines the rules of private law and (within the limitations of the national constitution) determines its own policies of social and industrial regulation. A corporation having factories in three states will be governed by three somewhat differing bodies of law. A commercial concern having its offices in New York or Chicago may do business in all of the forty-eight states, and its transactions may be governed by the differing laws of forty-eight jurisdictions. Not only this, but contiguous states will have many governmental problems in common. For example, New York and New Jersey have a common problem of harbor facilities, as also have Illinois and Indiana. Where navigable waters constitute a common boundary, questions of civil and criminal jurisdiction will arise, and joint arrangements for policing borders may be desirable.

Limited power of the nation

The national government is, and must continue to be, the chief agency for functions of common interest to the several states. The federal courts have jurisdiction over controversies between citizens of different states, and Congress may at some time enact a federal code to be applied in these cases. Such a step would go a long way toward forcing a great degree of uniformity in the law of the several states. But the national government has no constitutional authority as to many matters that involve relations between states.

Uniform state laws

A certain amount of effective work as to interstate relations has been accomplished by voluntary action. For a number of years states have appointed commissioners on uniform state laws. The commissioners so appointed by the several states have met in annual conference, and have agreed upon a number of proposed uniform state laws, more particularly in the field of commercial law. These commissioners seek to deal with

CHAP. II

matters as to which they think uniform legislation should be enacted in all of the states. Their recommendations are then submitted to the several state legislatures for enactment. In order to accomplish this purpose, forty-eight independent state legislatures must be persuaded to adopt without change the recommendations of the commissioners. Difficult as this task is, it has been substantially accomplished as to the law of negotiable instruments, and is well on the way to accomplishment in the law relating to the sale of personal property and in laws relating to other fields. Of course the terms of such a law are always subject to amendment in each state. After identical statutes have been passed in the several states, the law does not remain uniform unless the highest courts in the forty-eight states construe it to mean the same thing; and such uniformity of construction has not been accomplished. On the whole, however, important results have been accomplished by the movement for uniform state laws.

Governors' conferences

A promising experiment was inaugurated in 1908 when President Roosevelt called a conference of governors. Such conferences have been continued, and at first it seemed that they might result in effective coöperation among the states for common ends. They have, however, ceased to be attended by any large number of governors of important states, and have not fulfilled their earlier promise. The day-by-day problems of state government are too technical to be effectively dealt with by a casual meeting of governors. A greater degree of interstate coöperation has been accomplished by annual meetings of organizations composed of officers doing more specialized governmental work in the several states.

Compacts among the states

The constitution forbids a state to "enter into any agreement or compact with another state or with a foreign power" without the consent of the national Congress. Adjoining states or states having a common boundary may upon many matters find it useful to enter

into compacts, with the consent of Congress. It has recently been urged that compacts among states may be effectively employed to carry out common policies of interest to several states. The results to be accomplished in this way may easily be exaggerated, though compacts do afford a means of accomplishing desirable ends.[1]

[1] See Report of the Committee on Interstate Compacts, presented to the thirty-first annual meeting of the National Conference of Commissioners of Uniform State Laws (1921). See also A. A. Bruce, "Compacts and Agreements between States," 2 *Minnesota Law Review*, 500 (1918).

NOTE TO CHAPTER II

Students in each state should know how that state is represented in national nominating conventions, and how it nominates and elects its presidential electors.

Upon the exercise of national authority a satisfactory discussion will be found in Robert Eugene Cushman's *Studies in the Police Powers of the National Government* (reprinted from the *Minnesota Law Review*, 1919, 1920).

The federal subsidy plan can best be studied by obtaining from Washington the documents outlining in full the conditions under which each subsidy is granted.

From the standpoint of interstate relations, it will be well to make a detailed study of the actual results accomplished by the governors' conferences and by the Commissioners on Uniform State Laws. While governors' conferences have not been effective, they should not be ignored; but a more fruitful source of study is that of organizations attended by state officers performing the more detailed work of government.

Dr. James Brown Scott's volumes on *Judicial Settlement of Controversies between States of the American Union* (2 vols., New York, 1918) will serve as a basis for studying the settlement of specific boundary and other controversies between states.

CHAPTER III

THE STATE AND ITS SUBDIVISIONS [1]

National government directly enforces its law

THE national government has established not only its independent legislative organization, but also a complete system of courts and a complete administrative organization for the enforcement of national law throughout the country. In the execution of national policy, therefore, the national government has full authority. It is in no way dependent upon action or inaction upon the part of the several state governments. To some extent state courts perform federal functions, as in the matter of naturalization; and to some extent the state administration acts substantially as an agency of the national government, as with respect to the national guard. A rather large use was made of state governmental organizations during the recent World War, but on the whole the national government, in the enforcement of its policies throughout the whole territory of the United States, is independent of the state governments. The relations between the two governments are chiefly those of coöperation, and in some cases the national government to a large extent dominates the states through its use of subsidies payable to the states under certain conditions.

States use locally elected officers

State government, on the other hand, is composed of two somewhat distinct and independent organizations. What is ordinarily referred to as "state government" is the central organization located at the state capital. This organization does much the smaller part of the work of

[1] In connection with the whole subject of this chapter see Alfred Z. Reed, *The Territorial Basis of Government under the State Constitutions*, (New York, 1911); and W. F. Dodd, "Political Geography and State Government," *Amer. Pol. Sci. Rev.*, XIV, 242-276 (1920).

the state. Local governments with locally elected officials are to a great extent agencies in carrying out state policies and state law. The central state government, unlike the government of the nation, does not have within its own complete and direct control the means of enforcing the policies which may be adopted for the state as a whole. With locally elected officers chosen in different parts of the state and charged with the enforcement of state law, uniform administration throughout the whole territory of the state is rendered difficult. Without an organized control from a single source, state policy will be effectively enforced in one community, ineffectively enforced in another, and perhaps altogether disregarded in still another.

Organized relationships between state and local governments

The state organizes its own legislative department independently of local governments within its territory, although it uses local governing areas to a large extent as electoral districts. The state directly charges itself with the administration of justice, and in each case has at least one court of appellate jurisdiction exercising authority over the whole state. In most of the states, however, judges of trial courts are elected from local districts, as are also the official prosecuting officers. In the general field of administration the states rely to an even greater extent upon locally elected officials; though for certain types of legislation they have set up machinery for the direct enforcement of state policy. For the enforcement of state law, primary reliance is placed upon locally elected officials. Realizing this, the states have steadily tended to establish a more effective degree of supervision over locally elected officers as agents for the execution of state policy.

Twofold function of local government

Local governments have a twofold function. They serve as agents of the state government for the execution of state policy; and they also serve as agents of their various local communities for the doing of local governmental tasks in which the state may not be primarily

CHAP. III

interested. Both types of activities have enormously increased within recent years. If the two types of functions could be separated, it would be relatively easy to work out some system for state supervision over the activities of local governments as agents of the state, leaving to such governments a completely free hand with respect to purely local affairs.

Distinction between two functions difficult

But difficulties present themselves when we come to consider what are state functions, in which the state has a clear and definite interest; and local functions, in which the state does not have such a clear and definite interest. In a recent book dealing with local government in the United States,[1] county functions are divided between those of state administration and those of local administration. Among the functions of local administration are placed education, libraries, highways, charities, hospitals and corrections, sanitation and the conservation of health, and recreation. All of these matters are clearly of state interest; and as to most of them, a large number of states have by legislation established general policies. What is a state function and what a local function is a varying question from one period to another, and also to some extent from one type of community to another. There has been a constant transfer of functions from local governments to the states. At one time the care of the insane and of various types of mental defectives was handled by local governing bodies, as was also the custody and care of persons convicted of violating state law.

Highways

Take for example the matter of highways. State governments have to a greater and greater extent within recent years planned systems of state highways, issued bonds to pay for highway construction, and set aside specific sources of state revenues for highway purposes. The states are leading in the movement for better high-

[1] Herman G. James, *Local Government in the United States* (New York, 1921).

ways within their borders, because this matter is a state function, although counties and other units of local government are used as agencies of the state; and cities and villages are expected to pave their own streets. So far as a large city is concerned, there is no real conflict between the local function of paving streets and the more general function of maintaining a highway system; but when we come to villages and small cities that lie directly within the line of general highway systems, the paving of streets becomes essential as a link in a general policy of highway construction; and the problem ceases to be a purely local one.

Parks

Local parks may perhaps properly be regarded as matters of purely local concern. But many states are authorizing or establishing forest preserves covering areas too large in many cases for purely local administration, and a number of states have state parks. In a matter closely related to parks, that of city planning, it is very definitely true that the problem becomes one of more than local interest, and sometimes one of practically state-wide interest, when a state has a large number of urban communities closely adjacent to each other. Even where a state is not largely urban, it may be proper for the state to do a good deal in coördinating the park, recreation, and highway plans of the various local communities.

Urban areas

Where large metropolitan areas have developed in a state, but are not within the limits of a single local governing body, the problems of the whole area will often constitute a single unit and will have to be dealt with as such. Clearly, in such a case as this, it is out of the question to draw a line between state and local functions upon the basis of the type of activity carried on by the one or the other. This has been necessarily recognized by the state of Massachusetts with respect to many matters affecting the city of Boston and surrounding urban territory.

CHAP. III

Special problems of large cities

The police administration for the enforcement of state law is everywhere in this country legally regarded as a state function. The police of Baltimore, Boston, and St. Louis are still under direct state control. However, the sheriff, a locally elected officer, is the chief police officer of the county; and, outside of several great cities, the police departments are under the control of locally elected officers. The function of police is really in part local, although theoretically it may be regarded as more distinctly a state function. Many activities of a police force in a large city are not common to the enforcement of the law in the smaller communities or in the rural districts. A city such as New York or Chicago has a great mass of municipal ordinances with respect to health, fire-protection, buildings, and other matters. Such regulations are necessary in large cities, but an equally detailed regulation of these matters is not requisite in smaller communities. All of these matters, however, are subject to enforcement through police control, just as is also the highly important matter of street traffic in cities. The regulation of purely street traffic in cities, although properly a police function, is one of distinctly local concern. In larger communities there is need for greater governmental activity, but certain types of activities needed in larger communities and in smaller ones are not dissimilar in character. This has been recognized by Ohio and some other states, through the enactment of state building codes, laying down certain minimum building standards for the whole state.

Shifting of functions

No line of division between state and local functions can be drawn, upon which we may build a definite basis for determining what things should be done directly by the state government; what should be done by local governments as agencies of the state, under state supervision; and what should be done by local communities substantially free from state control. All types of governmental activity within the state have greatly in-

creased within recent years, and there is necessarily a shifting of functions from one type of governmental body to another. Certain functions that can best be performed by a larger governmental area have shifted from local communities to the state. Other functions have shifted from smaller local governing areas to larger areas of local government. For example, in the state of Illinois there has been a transference of functions from the township to the county, because of the greater effectiveness of the larger governmental area. Throughout the country for some years there has been a tendency to do away with the small school district and to concentrate functions of school administration in the township or the county. The real problem in the distribution of governmental functions as between state and local government, and as among the different types of local government, is that as to the governmental area which may under existing conditions perform the particular function most effectively.

Increased complexity of local government

With the growth of city populations and the increased complexity of industrial and social life, there has come a great increase in the number and character of local governing bodies. The local governing areas vary from state to state, and no effort will be made in this book to point out all of the variations within the forty-eight states. Attention should, however, be called to the fact that the growth of urban population is the chief element in increasing the number and character of local governments. To this may perhaps be added the necessity for better conditions of agriculture, leading to a great variety of irrigation and drainage districts throughout purely rural communities.

Types of local government

In this country the tendency has been to create a new type of local government for each new type of local activity that needed to be undertaken. In all of the states we have certain general and to some extent uniform types of local government. There are counties in

CHAP. III

all of the states (although Louisiana may be excepted, for the name of a similar local governing district in that state is the parish). In New England the town is the chief area of local government, although counties also exist. In a large number of other states the town or township exists as an area of local government, but with a lesser share in local governmental work than in New England. Cities and villages have developed with amazing rapidity in this country. More than half of the people of the forty-eight states now live in communities of more than 2,500 inhabitants, which are classed by the United States Census Bureau as urban. Cities of more than 100,000 have more than one fourth of the total population. The problems of city government have tended for a number of years to outweigh in public discussion all of the other problems of local government. For smaller urban communities most of the states have set up a simpler form of village government.

Less common local areas

In addition to these common types of local government, there are numerous other forms, which vary greatly from state to state. A number of the states have set up separate local districts for school purposes. This was the prevailing system of school administration before 1890, although the tendency is now toward the use of larger areas, which may also be employed for other local governing purposes. The small school district is chiefly a rural area. In addition, there have been set up in urban or partly urban territory park districts, sanitary districts, and various other types of districts for special types of governmental activity.[1]

Reasons for creating new districts

Districts have been multiplied by means of new creations, and those once created are seldom abolished. The reasons for this tendency are various. A number of state constitutions impose limitations upon the debts of municipal corporations. In Illinois it has for this reason been

[1] Upon special types of districts, a thorough study has recently been prepared, as a doctor's thesis at the University of Illinois, by Dr. F. H. Guild.

regarded as necessary to create a new governing body when a new function needed to be undertaken within the territory of a municipal corporation which has already borrowed to the extent of its powers. The new municipal corporation, with somewhat varying boundaries, has its own debt limit independent of the governing areas already occupying substantially the same territory. Another force causing the multiplication of independent local governing bodies within the same area has been the feeling that certain activities should be kept separate from the general field of local government, and that with separate organizations political influence would be less controlling. This has been one of the reasons for desiring independent local governing bodies for school purposes. In Indiana the township serves effectively both as an area for general local government and as the area for school administration; and a number of states are satisfactorily using the county for both purposes. In many states the policy of local option legislation has been adopted. The state legislature passes a law authorizing the creation of districts for the purpose of undertaking new functions. Such districts are created by means of local petitions and popular votes within the areas affected. Through this plan the state surrenders control over the creation of new local governing areas.

Overlapping areas

Over a large part of the territory of this country, local governing bodies lie one upon top of another in complex and confusing disorder. The situation in Illinois is probably worse than that in most of the other states. Within the state of Illinois the situation is somewhat worse in communities like Chicago and East St. Louis. The whole territory of the city of Chicago is within the limits of a county (which also is organized as a forest preserve district), within the limits of a sanitary district, and, of course, within the limits of the state. Within the city there are also somewhat independent organizations for the administration of schools, the

CHAP. III

public library, and the municipal tuberculosis sanitarium. Virtually every part of the city is within the limits of a park district. There are three large park districts and fourteen small ones. Each of these governing areas is substantially independent of all of the others. Yet the situation of Chicago is not much worse than that of most other urban districts within the state of Illinois. For cities like Seattle and Los Angeles a similar situation presents itself. Conditions are almost as bad in many other urban communities, and are not materially better in large parts of the rural territory of the country. This complexity of local governing bodies makes more difficult the satisfactory solution of the relationship between state and local functions. In most of the states the state legislature is responsible for the creation of numerous local governing bodies and for their powers. The state must assume some responsibility for the policies and finances of all of these areas, and must to some extent coördinate the numerous activities of diverse local governing bodies.

Local areas as agencies of state

Cities in this country are the chief agencies for the performance of governmental functions of a definitely local character; although cities serve to a very large extent also as agencies for the execution of state policy.[1] Counties are to a very large extent agencies for the execution of state policy, although the local activities of counties have grown along with the growth of the functions of the county as a state agency. The New England town is perhaps primarily a body for the performance of local functions, although it also has state functions and constitutes the chief unit of state legislative representation. Separate school districts, where they exist, are in part serving the particular needs of their local

[1] In the early days the recognition of cities as distinctly state agencies was accompanied by complete state control over the appointment of those who administered city governments. In the state of New York, mayors of cities were from an early time appointed by the state government; but constitutional amendments in 1833 and 1839 provided for their local election.

communities, but in large part at the same time carrying out state policy. Drainage, park, sanitary, forest preserve, and other types of local governing areas are to a large extent performing functions of local government; but many of these functions bear close relationship to matters of state policy. For example, in matters of drainage and irrigation one particular farming area may have a definite local interest, but the interests of that area may conflict materially with the interests of similar areas in other parts of the state. For this reason the states of Washington, Utah, Texas, North Dakota, Oregon, Nebraska, California, and Wisconsin have sought to set up some type of state supervision over drainage and irrigation districts, and Indiana in 1921 provided for state technical advice in connection with the formation of local drainage districts.

Legislative power and local government

Outside of the states that have adopted municipal or county home rule, substantially all of the local governing bodies are created by and derive their powers from state legislation.[1] Limitations of various types have been imposed, but in general it is still the legal theory that all types of local governing bodies are directly and completely subject to state legislative control. For a while the New England town sought to assert something of independence from such control, but judicial decisions have been against this position. In the earlier development of local government the county was regarded as not completely a corporate body, and as in certain respects more completely subject to state authority than an incorporated city. The incorporated city still has a legal status somewhat different from the county, because its distinctly local functions are more important. As a result of this greater importance of purely local functions, the city has a greater degree of liability in the courts for

[1] Constitutions in a number of states create counties and provide for their organization. In recent years constitutional provisions regarding local government have become more common; but the statement in the text is substantially true.

CHAP. III

its acts; and the property of the city not used for purely governmental purposes is to some extent free from state legislative control.

Special legislation

A complete subordination of local governing areas to state legislative authority led to serious abuses as population veered from rural to urban communities. When the first great development of cities began, state legislatures were substantially free from constitutional restrictions upon special legislation. The natural tendency, therefore, was to pass special charters for each city, and to alter these charters at the legislative will, or at the will of those who happened to be politically dominant in the legislature at the particular time. Special legislation was not limited to cities. It affected counties and other local governing areas, as well as private corporations and private individuals; but it found one of its most active fields in the sphere of city government. State control by means of legislation specially applicable to particular cities constituted an exaggeration of state supervision, although the supervision was ineffective and unsystematic; and oftentimes it was employed for temporary political advantage, against the best interests of both the city and the state.

Limitations on special legislation

As a result of the abuses of special legislation, numerous provisions came into state constitutions, prohibiting special legislation or throwing certain safeguards around its enactment. Some thirty states now require all laws with reference to cities to be general, or expressly prohibit special legislation for cities and other municipalities. Other states have prohibitions against special legislation for certain types of cities. Some have requirements permitting the classification of cities as a basis for legislation; others require public notice before the introduction of local or special legislation.

Evasion of limitations

In states that prohibited special legislation altogether, efforts to evade such prohibitions at once began. States began to classify cities, and in many respects classifica-

tions upon the basis of population have been upheld. In some cases classifications of cities were permitted for a while to destroy completely the constitutional prohibitions against special legislation for cities. In Ohio before 1902, cities were divided into eleven classes and grades, and each of the eight principal cities of the state was in a distinct class or grade. The supreme court of that state, however, in 1902 decided that the then existing plan of classification was invalid.[1]

Classification of cities

The efforts to evade complete prohibitions of special legislation had some justification. It has been common in this country to treat all counties as if their governments and problems were alike, irrespective of whether they were small rural counties of less than 10,000 inhabitants, or great urban counties approaching 3,000,000 inhabitants; and much the same theory has been applied to cities. Larger cities have needs which vary from those of smaller communities. The theory of municipal legislation has been that of granting municipal powers in great detail. Cities or other municipal corporations are presumed to have no powers other than those expressly granted, or those clearly and directly implied from the expressly granted powers. Under this theory as to municipal governments, and under the plan of legislative grants of power, it was substantially necessary for cities to go to the state legislature every time a need developed for the exercise of a new municipal function. Such needs were certain to develop much more frequently in the large than in the small communities. Some classification of cities has been sustained in substantially all of the states, and has in part accomplished the purpose of moderating the stringency of provisions against special legislation, while at the same time protecting the cities themselves to some extent from undue legislative interference.

[1] State *v.* Jones, 66 Ohio St. 453 (1902).

CHAP. III

Local option laws

In some states, the prohibitions of local and special legislation have been indirectly avoided by what is termed "local option" legislation. The state legislature under this plan passes laws which apply to all of the communities that adopt them. Many of these laws have been passed upon application of particular communities in order to meet certain special needs, but the fact that they may be adopted by all cities to which they may apply relieves them from the danger of being held special legislation. There has also been a good deal of legislation general in form but actually special in character. The prohibitions upon special legislation were adopted as a means of protecting local governing areas, and more particularly cities. To some extent they would at the same time have crippled these local governing areas, had they always been construed with great strictness.

Other protections of cities from legislative action

Certain other methods of protecting local communities have been adopted. In California, Washington, and Illinois, constitutional provisions permit local taxes to be levied only by the corporate authorities of local governments. These provisions prevent legislation creating new local taxing bodies without the consent of those who are to be taxed. In Illinois and some other states there are constitutional provisions forbidding the grant of street-railway privileges within cities without the consent of the cities themselves. The New York constitution of 1894 permits special legislation, but provides a local veto power in the hands of the mayor, or of the mayor and council, of the city affected by such special legislation. The legislature in this state does, however, have authority to pass the law after its disapproval by the mayor, or by the mayor and council. This procedure has prevented the enactment of a good deal of special legislation not approved by the cities, but in some cases special acts have been passed against the

positive objection of the cities affected.[1] An amendment to the constitution of Illinois adopted in 1904 permits special legislation for the city of Chicago, subject to the condition that such legislation shall not be effective until approved by the people of that city at an election.

Municipal home rule

The plan of special legislation and special charters constitutes an exaggeration of state legislative control over cities, without any definite and uniform policy resulting from such control. Thirteen states have now adopted constitutional provisions authorizing cities (and in many cases villages) to frame and adopt their own charters of municipal government. Some of these have also by constitutional provision sought to grant to cities at the same time a sphere of local powers, independent of state control. The California constitution provides that "It shall be competent in any charter framed under the authority of this section to provide that the municipality governed thereunder may make and enforce all regulations in respect to municipal affairs, subject only to the restrictions and limitations provided in their several charters, and in respect to other matters they shall be subject to general laws." Similar efforts to give to the cities under municipal home rule a definite sphere of powers, independently of state legislation, have been attempted in Michigan, Ohio, and Colorado. The Colorado constitution provides that the locally framed charter and ordinances made pursuant thereto shall with respect to local and municipal matters "supersede within the territorial limits and other jurisdiction of said city or town any law of the state in conflict therewith." The Colorado constitution also expressly provides that cities under municipal home-rule charters shall have powers over the creation and terms of municipal officers, their powers and duties; the creation and regulation of police; municipal courts, their jurisdiction and offices; all mat-

[1] For the operation of this New York provision, see a note by Gustav L. Schramm in *Amer. Pol. Sci. Rev.*, XVI, 102-107 (1922).

CHAP. III

ters pertaining to municipal elections; the issue, refunding, and liquidation of all kinds of municipal obligations; the consolidation and management of park or water districts; the assessment, levy, and collection of taxes; and the imposition, enforcement, and collection of fines and penalties.[1] Statutory provisions authorizing the local framing of city charters have been enacted in Iowa, Louisiana, South Carolina, Mississippi, Florida, and Connecticut.

County home rule

California authorizes counties to frame charters for their own government, and expressly prescribes that "the provisions of such charters relating to the powers and duties of boards of supervisors, and all other county officers, shall be subject to and controlled by general laws"; and the state of Maryland, which has also authorized counties to frame their own charters, does not seek to grant to such counties a sphere of powers independent of state authority. If county home rule is to develop, it seems hardly possible that any large sphere of purely county powers can be marked off and freed from state supervision.

Limits of municipal home rule

Municipal home rule as to cities has in some cases gone farther than can readily be justified, in the effort to draw a line of distinction between purely local powers and those properly coming under state supervision or control. The state must keep some degree of control as to functions in which more than one local community is interested. It is impossible to separate sharply two types of functions; and it is dangerous to set up, within the state, communities having local powers of a broad character independent of state supervision. There is little danger in giving a large degree of home rule as to municipal and local government organization. It is also

[1] For a full but brief discussion of this subject, see Constitutional Convention Bulletin 6, on "Municipal Home Rule," issued by the Illinois Legislative Reference Bureau in 1919. For a more detailed discussion see H. L. McBain, *The Law and Practice of Municipal Home Rule* (New York, 1916).

desirable that municipal powers be granted in general terms, without specific enumeration, and that we abandon the narrow construction of such powers which exists in most states. With reference to local matters, there should be a presumption in favor of full municipal power. But power must remain in the state to assert and exercise supervision over functions of government which are or may become of more than purely local interest; and to develop policies for the coördination of local activities and for the protection of local tax-payers.

Size of local areas used as agencies of state

Local governments act as agents of the state in the performance of numerous functions; and for years a systematic supervision by the state over these functions has been developing. At the same time there has been a tendency to use larger local areas as state agencies in local affairs. The smaller the number of local areas, the more effectively may the state supervise their work. For example, the state of Illinois would find it impossible to supervise in detail the work of some 12,000 school districts, a large number of which maintain small one-room schools. Ohio has in recent years accomplished a great deal of improvement in school and health administration, through increase in the size of local governing areas for these purposes. Such increase in the size of local areas makes for more efficient local administration as well as for better state supervision. Local action and state supervision are not conflicting forces, but merely means of accomplishing a single purpose.

Problem varies from one state to another

The area of a state has a good deal to do with the number of its local governing units and their relationship to the state government. For example, the state of Delaware, with but three counties, has a different problem of county relationship from that of Illinois with one hundred and two counties. The number, area, and population of the counties, or other local governing districts, also has a distinct bearing upon their relative importance in the affairs of the state, and upon the effectiveness with

CHAP. III

which the state may organize machinery for supervision over their activities. The relationship between the state and its local governing units is in some states complicated by the fact that a single city or county in some cases contains a very large proportion of the population of the state. Cook County, with nearly one half of the population of Illinois, affords a striking illustration of this problem. One great city or county, with substantially half of the state's population, constitutes a serious problem distinct from the other local government problems of the state. It is also unfortunately true that in a situation of this type political difficulties are likely to present themselves, because of sectional alignments between so large a community and the rest of the state; although, as a matter of fact, the issue in such a case between the urban and the rural population is more often one manufactured for political purposes than one that has arisen because of actual difference in governmental problems.

Election areas

Problems of government are rendered more complex by the areas into which the several states are divided for election purposes. In most of the states outside of New England, the county forms an area for representation in the two houses of the state legislature; or is a unit whose lines may not be crossed in making up areas for legislative representation. Each county forms a senatorial and representative district in Wyoming. Illinois and North Dakota divide the state into but one set of districts for legislative purposes, and provide that each district for senatorial purposes shall elect more than one member to the lower house. The California constitution of 1879 divided the state into forty senatorial and eighty assembly districts, contemplating that each senatorial district should be divided into two districts for the election of members of the assembly. The California constitution also requires that districts for the election of members of the federal house

of representatives shall consist of compact groups of assembly districts. In this way an effort was made to work out a definite relationship between three types of electoral areas. In Illinois the senatorial districts are each used for the election of three members of the lower house of the legislature. However, no effort is made in this state to coördinate congressional districts with senatorial districts.

Judicial election areas

There are various types of electoral areas in the United States other than those for the choice of members of the federal and state legislative bodies. In Illinois there are circuits for the organization of circuit courts, composed of contiguous counties, with one hundred and one counties outside of Cook County divided into seventeen districts. The state is further divided into seven supreme court districts, from each of which one member of the supreme court is elected; and into four appellate court districts for the holding of appellate courts, and the election of clerks of these courts. Illinois has fewer electoral areas than some other states, and less of overlapping as among the various electoral and local governing bodies. In many states there are two separate and independent series of districts, one for the election of members of the upper house of the state legislature, and the other for the election of members of the lower house, and these districts cross the lines of other electoral districts and of various local governing bodies.

Need for simplification

Both efficiency in local government and the coördination of state activities with those of local governments depend upon the simplification of the number of local areas. Virtually every one of our states is now a patchwork of overlapping local areas for governmental and electoral purposes. One piece of territory will often be within a number of districts, all of which have different boundaries. Once the citizen gets accustomed to the whole set of governmental and electoral areas that concern him, the cards are reshuffled and he must learn the

CHAP. III

lesson all over again. A constitutional policy of periodical reapportionment shifts electoral areas. Local governing areas are of course more stable. In order to be well done, a governmental task must be large enough to attract attention. One of the chief difficulties with our systems of local government is that we have taken the problems affecting a particular area, and set up a separate government to deal with each one of these problems. Each governmental body thus has a task too small to be effectively done; and the citizen is so confused by the multiplicity of governing bodies that he has no effective means of knowing what any of them are doing.

Permanency of local areas

It is out of the question, even in a new state, to carve out local government areas at will, for the factors that determine the development of population must often be unknown to those who would plan a theoretically perfect system of local government. In all of our states we have organized systems of local government, though in the newer states boundaries are in many cases purely artificial survey lines. In these newer states shifting and readjustment of local boundaries is still going on. However, for most of the states earlier generations have to a great extent fixed a permanent political basis of local government. The influence of the early division of states into towns or counties is not that merely of a dead hand, for these organizations have now to a large extent become a definite part of the consciousness and sentiment of the people of the several states. This is true not merely of the counties or towns of larger population. Probably it is not so true of the areas of large and growing population as of the areas that have remained stationary or gone backward. It may be urged that the areas that are not progressing in population should to a large extent be disregarded in the planning of the political future. But even if this were admitted in theory, such areas, taken together, have a political influence that can not be disregarded.

Tradition *vs.* present need

There is much to be said in favor of preserving areas that have a historical background and have established themselves in the sentiment of the people, as against a policy of splitting the states into districts or counties on a purely utilitarian basis. However, the problems of governmental areas must be large enough for effective handling; and electoral areas for state and local purposes must take into account the fundamental American principle of equality of representation. Many counties will continue to have a population too slight for the effective handling of their governmental problems. To some extent, with the development of population, counties of large territory must be split up into smaller areas for convenience of administration; but counties of small area and small population present a difficult problem, especially when, as in Illinois and some other states, many such counties are actually decreasing in population. What can be done with respect to the working out of governmental problems as to such counties is not to be solved here, nor to be solved at once; but legislation in Illinois in 1917 points in the direction of a possible solution by authorizing counties to unite in the maintenance of county poor farms.

NOTE TO CHAPTER III

The author's article on "Political Geography and State Government" in the *American Political Science Review* uses the state of Illinois as the basis for discussion. A somewhat similar analysis should be made for each state.

In order to understand government intelligently, each citizen should know what governmental bodies exercise authority over him, and something of the relation of each such body to the others.

CHAPTER IV

THE FRAMEWORK OF STATE GOVERNMENT

Changes in state government

IF we could study cross-sections of state government at fifty-year intervals since 1776, we should find each specimen different from that of fifty years before. Yet the similarities would be sufficient to make it clear that we were studying the same organism at different stages of its growth. A mere superficial examination, moreover, would lead to the conclusion that little change had taken place, for many of the external characteristics remain the same. Each has since its establishment had a written constitution, and three departments of government. In each the territory has since the beginning been organized into certain areas of local government. All are now, as in 1789, controlled by the same national constitution, which has undergone comparatively little textual change. Yet state governments to-day are materially different in structure and function from those of even fifty years ago. These differences are reflected to some extent in state constitutions. Yet the constitution of Massachusetts, while many times amended, is still in its essential features the document framed in 1780. The functions of state and local government, and the organization for performing those functions, have enormously expanded in Illinois since 1870; yet the state constitution has been but slightly amended since that date.

Essential elements in state government

The essential elements that go to make up the state government of to-day are not to be found in a single document, nor altogether in any written form. Some will be found in constitutions; some in statutes; some in judicial decisions; and others in political and governmental practices. These elements vary from one period

to another, and with the personalities who at different times dominate political policies and governmental organization. Before entering upon a detailed analysis of state governmental organization, it will be well to outline briefly the more important of these elements.

THE THREE DEPARTMENTS OF STATE GOVERNMENT

Separation of powers

The constitutions of the forty-eight states and of the United States either express or imply the principle of the separation of powers of government. This principle is well expressed by the Massachusetts constitution of 1780: "In the government of this commonwealth, the legislative department shall never exercise the executive and judicial powers, or either of them; the executive shall never exercise the legislative and judicial powers, or either of them; the judicial shall never exercise the legislative and executive powers, or either of them: to the end it may be a government of laws and not of men."

Purpose of the principle

The framers of this and other similar declarations in the earlier state constitutions were fully conscious that government is a human institution, to be operated by human agencies. What they feared and sought to forbid was government by the arbitrary whim of those in political power. By a government of laws they meant a government conducted by human agencies, but guided by fair and equitable rules applicable alike to all under similar conditions. They thought this result could be best accomplished by the separation of powers.

Development of three departments

In the first state constitutions the legislative department was supreme, and the executive and judicial departments played a subordinate part. The first constitutions declared, but to a large extent ignored, the principle of the separation of powers. This supremacy of the legislative department did not continue long. The New York constitution of 1777 and the Massachusetts constitution

CHAP. IV

of 1780 gave greater powers to the executive department, and soon the courts were made independent of legislative control. The constitution of the United States, which from the first provided for a rather sharp separation of the three departments, has largely been the basis of subsequent state constitutional development. Within the fifty years following the Declaration of Independence, there developed in the American states three departments of government with somewhat equally balanced powers; and since this readjustment of the powers of the three departments, there has been a further and steady tendency toward the reduction of the powers of the legislative department.

Departments not independent

No government could be conducted through three departments, each performing certain functions independently of the other two. The activities of government are a unit, and require the close coöperation of the several departments. In practice little difficulty has been occasioned by complete dependence of one department upon another in essential matters. For appropriations the executive and judicial departments are dependent upon the legislature. In about two thirds of the states, constitutions vest in the legislative department power to determine the salaries of judges and of executive officers. The legislature by an arbitrary exercise of power may destroy the other departments. By vetoing all bills, the governor may substantially destroy the legislature and the courts, but he would at the same time destroy the possibility of obtaining appropriations for the support of the executive department. Where there is an uncontrolled pardoning power in the governor, such a power may conceivably be exercised so as to destroy the effect of criminal convictions. The courts, by an arbitrary exercise of the power to declare laws unconstitutional, could destroy the other departments. Each department has powers which if pushed to the extreme may be employed to destroy the others, and to destroy

government itself; but in human institutions such extremes do not occur. If an extreme exercise of power is attempted, the abuse quickly corrects itself. The lines of departmental powers are drawn by state constitutions in general terms. These constitutions change, as do also the practical lines separating the work performed by the departments. In theory, the principle of separation of powers was at first largely based upon the assumption that there are three distinct types of governmental work. But, early in American constitutional history, this theory of distinct types of governmental work was supplemented by the idea that three departments exist for the purpose of so limiting one another's actions as to prevent abuse of power. The principle of checks and balances in government was first fully developed in the federal constitution of 1787, though the Massachusetts constitution of 1780 shows clear evidence of its influence.

Legislative functions

Upon the theory that the three departments of government perform different types of functions, it is said that the legislative department exercises the power to make general rules determining policies by which the state is to be governed. Yet there has been in recent years a steady tendency to vest in other departments of government a large power to make general rules, under broad principles laid down by legislative authority. At one stage in state constitutional history, the creation of private and municipal corporations by special act was regarded as distinctly legislative in character. Now most of the state legislatures are expressly forbidden to create either private or municipal corporations by special act. In this respect the original type of legislative authority has almost entirely disappeared, and the real function in creating corporations has been transferred to the executive department, under rules laid down by legislation. The same statement applies to the making of rates for public utilities. The fixing of rates for such utilities is still regarded in theory as a purely legis-

CHAP. IV

lative function. However, in many states the legislatures have lost the power to make rates by special laws. In virtually all of the states the making of rates for public service corporations has been delegated by legislative authority to distinctly administrative bodies, subject to review by the courts.[1] In fact, in a few states, as in Arizona, the fixing of rates of public utilities has by constitutional provision been expressly delegated to an administrative body, subject to review by the courts. A function recently regarded as purely legislative in character has in this state been completely withdrawn from the legislature. In this manner does the line between legislation and administration constantly shift with the development of new types of problems. There has been a definite tendency in recent years to enlarge the rule-making power of the courts, and to withdraw from legislative departments the power to make the detailed rules under which the courts shall act. In Colorado, New Jersey, and Michigan, and to a less extent in other states, courts have been vested with direct authority to make the rules under which judicial procedure shall be carried on. In this respect a function at one time distinctly legislative in character has been transferred to the courts. The plan of transferring a large amount of subordinate legislation to the permanent executive organization, and of giving to the courts a large degree of power to work out for the whole state a uniform plan of judicial procedure, is highly desirable; but through it the executive and the judicial departments have come to have a larger and larger share in tasks of legislation.

Judicial construction of principle

The reasons for the principle of the separation of powers, as we find it in our present state governments,

[1] The power to fix rates of a public utility has actually been exercised by the courts in Massachusetts under authority conferred by legislative act, and justified upon rather specious grounds by Chief Justice Holmes in the case of *In re Janvrin* 174 Mass. 514 (1899). What is said of this case is not in disparagement of the result reached, but of specious arguments, based upon the principle of separation of powers.

are not to be discovered primarily in differences of function. It is largely for this reason that judicial decisions dealing with this principle are without consistency, and that the principle itself has been rejected as a controlling one in the field of local government. The courts find the principle, and numerous exceptions to it, announced in the constitution. When the principle is appealed to, they must make some application of it. But no one who reads the decisions of state courts in this field will feel that they have anything approaching a consistent rule with respect to the separation of functions of the legislative, executive, and judicial departments. To take a specific illustration, the courts of Illinois say that it is proper to vest in the judicial department the appointment of election officers, mine examiners, and park commissioners; but that it is improper, under the principle, to vest in the courts a power to review administrative action removing firemen and policemen. Similar illustrations may be found in almost every state. This flexibility of the principle has something of merit. Effective organization to deal with new problems would be handicapped if rigid and unchangeable lines were established between departments. It is probable that two thirds of the detailed work of state legislatures could now be delegated to the executive and judicial departments without violating the principle as judicially construed.

Division not based on theory

The lines of division at the present time are not lines of principle or of theory, but lines of fact. The principle of the separation of functions has a history running back over some centuries, and this is largely the basis for the general statements that we find in American state constitutions. The present lines drawn among the three departments of government represent the result of several divergent and conflicting influences. The principle of difference in function, as necessarily requiring a separation into three departments, still has a good deal of theoretical influence; but it has been only one of the

CHAP. IV

factors in producing the present result. From the theoretical point of view this principle had great influence in the first setting up of American state governments; although in the earlier period of our state constitutional history it had less of practical force in application than it has had in more recent years.

Checks and balances

The principle of checks and balances as among the three departments of government, which first gained an effective place in the national constitution, has been largely instrumental in determining the present lines of separation as among the three departments of state government. Curiously enough, the principle of checks and balances in government in many respects runs directly counter to the principle of the three separate governmental functions. The principle of checks and balances gained strength largely from the distrust of legislative supremacy, which developed very early in our constitutional history. The growing power of the executive in this country, however, has arisen not so much from any theoretical principle of checks and balances as from a distrust of the legislative department. Our present separation of powers is due not so much to any theories of government as to the practical working out of certain policies over a period of a century and a half. These policies first found their justification in a theory of separation of function, and then in a supplementing theory of checks and balances.

Decline of legislative power

The legislature has constantly tended to lose power; and the executive in all of the states except North Carolina has now come to have almost as large a share in the final result of legislation as have the majorities in the two state legislative bodies. In the appropriation of money for the expenses of state government, the governor now exercises a final and in many respects a decisive influence. Recent budget legislation in the states (reinforced by constitutional amendments in Massachusetts, West Virginia, Maryland, and Nebraska) has

tended to give the governor a greater and greater dominance over all stages of appropriation laws. The courts succeeded in establishing themselves as the equals of the legislature when their organization and the appointment of their judges became largely independent of legislative authority; and they quite early developed a superiority over legislative bodies through the power to declare laws unconstitutional. The courts seem to have lost something to the executive department, through the transfer to administrative bodies of the preliminary determination as to liability between employer and employee under workmen's compensation laws. Yet even here they have not lost in fact, but have gained, for the workmen's compensation laws have relieved the courts of a vast mass of unnecessary litigation regarding the relationships between employer and employee in case of accident, and have left to them the final authority to pass upon the actions of the administrative bodies which apply these laws.

Practical basis for three departments

Justification for the principle of separation of powers is not to be found in any theory, but in the practical application of the principle to the needs of present-day government. In the planning of machinery to do the work of government, certain functions must be vested in certain types of organization; and it is in practical effectiveness, rather than upon any theoretical grounds, that a division into the three departments of government must be founded. The function of adjudicating private rights may properly be vested in a department substantially distinct from those departments that determine and enforce the policies of the state. However, the courts, through their power to declare law unconstitutional, actually perform functions in the American states which are as definitely political as those performed by the legislative and executive departments. The function of administration must necessarily remain as a distinct function, requiring a permanent and continuous organization.

CHAP. IV

The function of legislation is that of determining new state policies, and requires something in the way of continuous organization for the study of the operation of government and for the recommendation of new policies, but does not require so permanent and complex an organization as do the judicial and administrative functions. In these respects there lies a proper basis for a distinction similar to that drawn by our constitutions as among the three functions of government. However, this distinction is not so iron-clad as general principles would require us to assume. It is entirely proper and desirable that some functions that seem more distinctly judicial should be handled through an administrative organization, and that some functions that seem more distinctly legislative (such as the making of rates and the making of rules for judicial procedure) should be vested in other departments of government.

Executive functions

The functions of an executive department in the American state government to-day may perhaps be classed in three groups: purely executive, quasi-legislative, and quasi-judicial. The executive functions of making rules and regulations, under legislative authority, with reference to the safeguarding of labor, public-health conditions, and other matters, are quasi-legislative. The functions of passing in the first instance upon the rates to be fixed for public service corporations, and of determining the amount of compensation due by an employer to his employee for an accident, may properly be termed quasi-judicial. Action by administrative bodies in these and other similar functions are made subject to a final review by the courts.

Judicial functions

The courts perform some functions of legislation in the making of rules, and there is a definite tendency to extend this rule-making power. In the administration of laws regarding the impaneling of grand juries and of juries, in the administration of estates, and in many other matters, the courts exercise functions of a distinctly

administrative character. The administrative functions of courts in their performance of judicial work have enormously increased in the larger communities of the country.

Three departments have similar problems of organization

Substantially the same principles of organization are involved in all of the three departments of government. The executive department, with all of the problems of permanent administration in its hands, necessarily requires a more complex organization, and a greater number of departments or branches, than do the other departments. The judicial department, with the different types of cases coming before it, and with the necessity of hearing appeals, requires an organization of a complex character, with problems in many respects similar to those of the executive department. The specialization of activity within the executive department must, however, continue to be greater than would be needed in a judicial department. For many cities, courts have been developed with specialized functions, and with separate branches for different types of cases. The legislative department requires less permanent organization, although the proper preparation of legislative work involves much the same type of permanent organization as does that of the executive department. The actual task of legislation is primarily that of determining upon rules of policy. For this there is needed not so much a complex organization as a body of intelligent representatives to whom carefully prepared data and carefully drawn bills may be presented for consideration.

Work of departments not dissimilar

There is no very real or sharp distinction in the nature of the things done in the actual performance of the powers vested by state constitutions in the three departments of government. The task of legislation involves, or should involve, to the highest degree the weighing of facts and the reaching of a conclusion upon the basis of such facts. The functions of the executive department involve not only the performance of purely

CHAP. IV

routine tasks, but to a large extent the making of general rules, the weighing of facts, and the decision of issues. The functions of the courts involve the weighing of facts and the decision of issues, but also administrative functions and to some extent a rule-making power. The courts also have in a great many of our states a large number of functions connected with local government which in no way affect directly the administration of justice; as, in many cities of Illinois, the appointment of boards of election commissioners and the administration of election machinery. The problems of administration involved in probate jurisdiction are quite as important as many of the administrative problems of the executive department. The executive department has a much larger proportion of routine work than either the courts or the legislature.

Actual relationships among departments

In the actual operation of state government the judicial department tends to be rather distinct from the legislative and executive departments. The legislative and executive departments necessarily act in close harmony, for the two are dealing with the same problems. The executive department spends most of the money appropriated for the conduct of state government. These appropriations must necessarily be made by the legislative department, largely upon the advice of the executive organization, which is to spend the money. Perhaps nine tenths of the laws enacted at every state legislative session have to do with either state or local administration, and in these matters the legislative department must to a very great extent rely upon the advice of the permanent executive organization of the state, which is constantly in touch with the problems of state and local administration.

The governor and the legislature

The relationships between the legislative and executive departments do not depend entirely or mainly upon constitutional provisions, but vary with the effectiveness of executive and legislative leadership. The governor's

power over legislation is much greater than that conferred by constitutional texts. The tendency of legislatures to pass most of their laws during the last few days of their sessions gives to the governor an absolute veto over most legislation; for his veto comes after the adjournment of the legislative bodies, which in most cases therefore have no opportunity to overcome a veto.

Legislative organization in the constitution

In the organization of the three departments of government, there has been a tendency for greater and greater detail to find its way into state constitutions. With respect to the legislative department, all of the state constitutions prescribe general rules as to organization and as to limits upon legislative powers and procedure. However, most of the rules as to procedure of legislative bodies, committee organization, and methods employed in the detailed conduct of legislative business are usually not in state constitutions but in legislative rules and unwritten practices. Similar legislative rules exist in many states, but similar rules do not always operate alike in two different states. The actual details of procedure are not always the same at two successive legislative sessions in the same state, although the legislative rules may themselves remain the same. The personal elements of legislative and executive leadership vary from state to state and from session to session in the same state.

Executive organization in the constitution

While increasing detail regarding state executive organization has found its way into state constitutions, much the greater part of the administrative work of state government is now controlled by legislative acts rather than by constitutions. In the actual conduct of executive business, the personality of the governor and his subordinates plays as large a share as do constitutions and statutes. This accounts for the fact that, under the same constitution and the same laws, the administration of one governor may be highly efficient, while the next may be ineffective.

CHAP. IV

Judicial organization in the constitution

The organization of the courts, as of other departments, has to a greater and greater extent found its way into state constitutions. But, from the standpoint of these constitutions, we have types of organization running all the way from that of Illinois, where all courts are either provided for or authorized by the constitution, to Rhode Island and Oregon, where the state legislature is given substantial control over the judicial organization below the supreme court. In all of the states, some courts are created and their organization determined by legislative act; and even in states like Illinois, where the constitution lays down an elaborate body of rules as to judicial organization, the legislature still has a fair degree of authority with respect to the detailed organization of the judicial system. Details as to judicial procedure are to a large extent to be found in state legislative acts, although in all states the courts have some rule-making power, and in some states the courts have a large authority with respect to the procedural rules under which their business shall be conducted. In a large number of states the constitutions have provided for elected clerks of courts, who are independent of the courts they serve. In a large number of the states provision is also made in the constitution for grand juries and juries. Although judicial organization is to a large extent provided for by the constitutions themselves, yet the detailed organization and administration of justice is to be found to a great degree in statutes, and to a lesser degree in the rules and practices of the courts themselves.

PUBLIC EMPLOYEES

Increased number of employees

The increased activities of government have caused questions as to the employment, promotion, compensation, and discharge of public employees to be among the great common problems of American state and local government. Several constitutions have civil service

provisions, but problems as to state employees are dealt with mainly by statutes, or by administrative rules and practices. Superior officers in our state government are to a large extent provided for by constitutional provisions; but the great mass of the work of state government is done, not by constitutional officers, but by subordinates of such officers, or by administrative departments created by legislative authority. When a state comes to have something like 10,000 employees, as does the state of Illinois, or a city something like 30,000 employees, as does the city of Chicago, a consistent policy with respect to such employees becomes essential. Upon the great body of public employees depends the effectiveness with which governmental work is done. A haphazard method of employing, promoting, discharging, and fixing compensation for this great body of employees is sure to lead to governmental inefficiency. The problem is greater for a state like New York and a city like New York than it is for the state of Illinois and the city of Chicago. It is proportionately less for smaller states, smaller counties, and smaller cities, but the character of the problem is the same. The general situation in most of our governmental bodies, state and local, to-day is still that of employment and discharge for political reasons, with salaries for the same type and character of work varying from one office to another in the same state. Such a plan makes it impossible to build up anything in the nature of permanent efficiency in governmental work; the power to appoint is legally vested in the head of an office, but is actually exercised by the leaders of the political party that is successful in the election.

Civil service laws

Civil service laws have been enacted in a number of states. Under them certain standards have been built up for the employment, promotion, and discharge of public employees. In some cases, as in New Jersey, civil service commissions have, under authority of law, actually standardized employment and sought to provide

CHAP. IV

equal salaries for the same types of work throughout the whole of the state service.

Problem yet to be solved

State and local civil service laws have improved conditions to some extent, but as yet have not brought about an effective organization for the conduct of governmental work. In the development of the public-school system, many communities have built up for the employment of teachers and school officers an organization which is more effective than that developed under state and local civil service commissions for other types of public employment. Both in the school system and through civil service laws, however, a start has been made toward developing a governmental policy with respect to the great and growing body of public employees.

LOCAL ADMINISTRATION AND ITS RELATION TO THE STATE

Local government

This matter has been broadly outlined in Chapter III. A great deal as to county government, as to municipal home rule, and as to city government may be found in state constitutions. There has been a tendency to place more and more of the details of local government in state constitutions. Municipal debt limitations found in state constitutions have had a large share in shaping the present complex structure of local government. However, most of the detail as to local government is still to be found in state legislation, supplemented by home-rule charters in the states that have adopted municipal home rule, and by local ordinances. In states like Illinois, which have by law given their cities a large share in shaping the details of local administrative organization, local ordinances are particularly important. Much of the real procedure of local government in each state is to be found not in written form but merely in local practices.

PUBLIC EDUCATION

School system

One of the most important elements in the framework of state government is that involved in the establishment of an elaborate system of free schools. With the encouragement of the national government, a free-school system has been built up in all of the states. We now have in most of the states a compulsory system of free education running throughout all of the elementary grades; and also a free system of high-school education, which is in part compulsory. This system is supplemented by state normal schools and state universities. The building up of an elaborate school system throughout the whole country, which expends a greater proportion of state and local revenue than does any one other single governmental activity, constitutes a fundamental element in the framework of our state and local government. The ideal of an educated citizenship constitutes one of the chief contributions of American governmental organization. This ideal has not been attained, and can not be attained through the mere expenditure of money; yet much has been accomplished by setting the ideal and by taking long steps toward its achievement.

MEANS BY WHICH GOVERNMENT SUPPORTS ITSELF

Taxation

Most state constitutions have limitations upon the methods of state and local taxation, but taxation in all of the states is primarily a matter of state legislation. Each state has an elaborate body of legislation with respect to taxes, and this legislation varies materially from state to state. Administrative practices in the assessment and collection of taxes must to a large extent be studied in order to know how the statutory regulation of these matters actually works. Here again the actual operation of governmental institutions depends in part upon constitutional provisions, in part upon legislative

CHAP. IV

enactments, and in part upon state and local administrative practices and regulations.

POSITION OF THE STATE IN THE NATION

Relation to nation

A general statement regarding this matter has been made in Chapter II. The relationship of the state to the nation will be found partly in the United States constitution and in the decisions of the United States Supreme Court construing this document; but the detailed relations between the two governments will be found to a greater extent in federal statutes and in regulations of federal administrative bodies established by acts of Congress. Something of the relationships must also be looked for in treaties. The relationships between state and nation will also be found in some part in state laws and in the practice of coöperation built up between offices and departments of the national and state governments.

POLITICAL PARTIES

Party control

The organization of political parties has during the past twenty years largely become a matter of state legislation; and state laws also determine the methods by which parties shall nominate their candidates for public office. Until comparatively recent times, the political party was regarded as a voluntary organization. However, the party became so important an element in the actual conduct of government that the state governments have largely regulated the organization and conduct of the party by law. It can not be said that the organization and regulation of parties by the state has been entirely successful. Before the states began by legislation to take over the political party and recognize it as an organ in the conduct of government, the parties themselves largely dominated the state and local governments and determined what these governments should do. The

same statement applies at the present time. If one wishes to know what the legislative and executive departments of a state are likely to do, he must discover what influences dominate the political groups controlling these departments. Political parties are organizations of voters; and their organization and methods have been influenced by the expansion of the electorate, and by the easier means of transportation and communication even to a greater extent than by legal regulation.

HOW CHANGES IN THE FRAMEWORK OF GOVERNMENT TAKE PLACE

Constitutions, laws, and administrative practices

Much of the framework of state and local government in this country is to be found in state constitutions. To know fully the meaning of state constitutional provisions in actual operation, we must be familiar with the decisions construing such constitutions, and also with many legislative and administrative practices as to matters that have never been passed upon by the courts. The larger part of the actual machinery for the conduct of state and local government, even in its more important particulars, is to be found in state legislation. Many administrative rules and practices supplement legislation, and must be understood if we are to know how government actually operates in a particular state, or in the particular community within which we happen to live. Local ordinances and regulations also vary to a large extent the detailed operation of government.

The human element

It is impossible to generalize accurately, as to state and local government, from one state to another; or, as to the operation of local government, from one part to another of the same state. The human factors in government are, after all, the most important; and these factors vary from time to time in the same state, and from community to community within each state. Party practices and changes in executive and legislative leadership vary

CHAP. IV

materially the actual conduct of government from one year to another. Changes in state government in some cases require changes in constitutions; in others, changes in statutes; but in others, changes merely in administrative practices and personnel. Although the matters dealt with in this chapter are fundamental in all of our state and local governments, it is important to emphasize the fact that the real framework of government is not to be found merely in constitutions and in statutes, but that it varies with the people who conduct government, and with the influences which the people of a particular community may bring to bear upon the conduct of government itself. Here again economic and social forces control. In the long run, they determine what shall go into constitutions and statutes, and to what extent institutions shall be established or discarded.

CHAPTER V

THE STATE CONSTITUTION

THE most important and most permanent document controlling the framework of state government is the state constitution. The state constitution is a law of a superior order and of a more permanent character than legislative acts. Like all human institutions, state constitutions tend to change in content from one period to another.[1]

Nature of state constitutions

The first state constitutions, adopted just before and just after the Declaration of Independence, vary in the form of organization which they set up. No effort will be made here to discuss these variations in detail. The North Carolina constitution of 1776 is fairly representative of these earlier constitutions. This constitution occupies about seven pages in Thorpe's collection of *American Charters, Constitutions, and Organic Laws.* It organized a state government with two houses, a Senate and a House of Commons (constituting a General Assembly), and provided for annual elections of the members of these two houses. The Senate was composed of one member from each county, and the House of two from each county and one from each town. Persons chosen to either house were required to be residents of the county in which they were chosen. In order to be eligible to the House of Commons it was necessary to possess a freehold of one hundred acres in the county represented. In order to be a member of the Senate it was necessary to hold three hundred acres in fee in the county represented. Only those who paid taxes could

First state constitutions

[1] For a detailed account of the development of state constitutions see J. Q. Dealey, *Growth of American State Constitutions* (Boston, 1915).

CHAP. V

vote for members of the House of Commons, and a freehold qualification of fifty acres was necessary in order to vote for members of the Senate. There was some variation of these requirements with respect to towns.

The two houses jointly elected the judges and the attorney-general, who were commissioned during good behavior; and also appointed the officers in the militia and the army. The Senate and the House jointly chose a governor for one year, and elected a council of state of seven members to advise the governor. This council was required to keep a journal and to lay it annually before the General Assembly. The governor's powers were not extensive, and were to be exercised under the supervision of the council of state. The two houses annually appointed a treasurer. Every three years they elected a secretary of state. Persons to serve as justices of the peace in the several counties were recommended by representatives in the General Assembly from such counties, and commissioned by the governor during good behavior.

A bill of rights is found in the constitution; but otherwise there was substantially no limitation upon the powers of the General Assembly. The constitution, however, provided that "the legislative, executive, and supreme judicial powers of government ought to be forever separate and distinct from each other." In this constitution, and the others of the early revolutionary period, reliance was placed primarily upon the annual election of representatives, who were to meet as a legislative body and to exercise substantially all of the powers of government.

READJUSTMENT OF POWERS OF DEPARTMENTS

Legislative supremacy

The struggles of the colonial period between the popularly elected assembly on the one hand, and the departments of government controlled by the British crown on the other hand, naturally led the framers of new consti-

tutions for independent states to distrust the executive branch of the government and to concentrate almost complete powers in the hands of legislative bodies. The first sixty years of constitutional development (1776-1836) were largely a period of readjustment of powers as among the three departments of government.

Election of governor

The distrust of the legislature arose in part because of the large powers that it had, and in part because it exercised these powers unwisely. The New York constitution of 1777 made the governor a popularly elected officer, as did the Massachusetts constitution of 1780 and the New Hampshire constitution of 1784. Virtually all state constitutions adopted after that of Massachusetts made the governor popularly elective, although the Virginia constitution of 1830 constitutes a notable exception. With popular election, the governor became independent of direct legislative dominance. With the development of popular participation in state government there was a distinct tendency to make other state executive officers elective directly by the people, and this movement may readily be traced by a comparison of the Michigan constitutions of 1835 and 1850.

Appointing power

Under the New York constitution of 1777 the executive appointing power was large, but was vested in a council of appointment composed of senators, who during much of the time were out of harmony with the governor. The council of appointment disappeared in 1821. The governor's appointing power has gradually been extended by constitutional provision, and its exercise has steadily tended to increase, by virtue of the fact that state governments have become more complex and assumed new functions, thus increasing the number of officers and employees necessary for the conduct of the work of government. Limitations on the power of state legislatures to appoint to office began to develop about the middle of the nineteenth century. These limitations were often coupled with express legislative authority to

CHAP. V

determine how appointments should be made; and legislative acts creating new offices have ordinarily vested this power in the governor of the state. The increase in the governor's appointing power has thus come, to a very large extent, not from express constitutional authority so much as from the creation of new offices and the natural tendency to vest appointment to such offices in the governor.

Veto power

There has also been a steady increase in the governor's power over legislation. Of the earlier state constitutions, that of South Carolina (1776) vested an absolute veto power in the president of the state, but this power was only once sought to be exercised, and was withdrawn by the constitution of 1778. The New York constitution of 1777 provided for a veto power in a council of revision, of which the governor was a member, and a plan somewhat similar to that of New York existed in Illinois from 1818 to 1848. The Massachusetts constitution of 1780 was the first to give the governor acting alone a suspensory veto over legislation, which might be overcome by action of two thirds of the members of the two houses. Although New Hampshire in 1784 largely copied her constitution from that of Massachusetts, provision for an executive veto was omitted. The federal constitution, framed in 1787, granted the president of the United States a veto power, to be overcome by a two-thirds vote in the two houses; and this plan has been followed in principle by most of the subsequent state constitutions. As the states adopted new constitutions, it has been usual for the veto power to be conferred upon the governor, and, although several states have but recently conferred this power upon their governors, North Carolina is to-day the only state whose governor does not have it. Some states still permit the governor's veto to be overcome by a bare majority of all of the members of the two houses, but the tendency has been to require a vote of two thirds. The veto power has been so extended

that in more than two thirds of the states the governor now has power also to veto separate items in appropriation bills. The constitutions of Washington and South Carolina confer upon the governor, in addition, power to veto any section or sections of a bill presented to him, while approving the remainder.

Executive department

Although there has been a steady tendency to increase the powers of the governor, there has been at the same time a tendency to increase the number of elective state officers in addition to the governor. This has built up a multiple-headed state executive department. In most of the states the governor is merely a superior state executive officer, and by his side there are other elective state officers with executive powers. The governor is the most important of these elective state officers, and his relative powers and importance have steadily increased.

Choice of judges

The executive department has gained in power at the expense of the legislature. Somewhat the same development has taken place with respect to the judicial department. In most of the early constitutions the judges were chosen by the legislative bodies, although in several states there was executive appointment, subject to confirmation by the executive council or the upper branch of the legislature. The power of appointment was in most cases gradually taken from the legislature. This power was in some states at first conferred upon the governor; but the movement for popular election, which gained force from 1830 to 1850, has extended popular choice to judicial as well as executive officers. The legislative power of impeachment has continued in most of the states as a means of control over both the executive and the judicial departments. To this has been added a power in the legislative bodies to remove judges, usually by action of an extraordinary majority.

Power to declare laws unconstitutional

The most important power acquired by the judicial department in the American states has been that of declaring invalid laws that, in the opinion of the judges,

CHAP. V

conflict with the constitution. The exercise of this power was not contemplated by the earlier state constitutions. In the earlier state governments the courts really occupied a subordinate position, but were able to assume this power largely because of the early development of distrust of the legislatures, and of the feeling that some check upon legislative power was needed. Once established, the judicial power over legislation has steadily grown, in part because the courts have assumed a more extensive and detailed supervision over legislation, and in part also because the state constitutions have steadily added an increasing number of limitations upon legislative action, such limitations being subject to judicial enforcement under the theory of judicial control over legislation.

LIMITATIONS UPON LEGISLATIVE POWER

Types of limitations

State constitutions are a superior and more permanent type of legislation. From the beginning there has been a tendency to lengthen these constitutions by placing more and more details into them. State constitutions are not subject to change by the ordinary process of enacting laws. When matters are placed in a state constitution, they are removed from direct control by the state legislative bodies. Through the introduction into state constitutions of detailed provisions, the power of the regular state legislative bodies has thus been limited. In addition, legislative power is strictly limited by a series of specific prohibitions which have from time to time been introduced into constitutions.

Limitations upon state debts

The first series of important limitations upon state legislatures resulted from the internal improvements movement, which gained force about 1830. The people of many states were carried away by a wild frenzy for internal improvements to be constructed at state expense. Plans that were often immature and impracticable were

forced upon state legislatures. Failure was sure to result. Because of unwise plans adopted by the states during the period from 1830 to 1850, virtually all of the state constitutions now have strict limitations upon state indebtedness. "As the people had driven their representatives to enter upon internal improvements without caution, so, when taxes began to press, they censured them without justice and disowned the policy." [1]

Limitations upon local debts

The states having excluded themselves from the field of internal improvements, their place was taken by private corporations. These corporations, in their turn, appealed for financial aid to the minor civil divisions of the states, upon whom no constitutional limitations had yet been placed. Cities, counties, and other subdivisions of the state might, therefore, aid railroads, if authorized to do so by the state legislatures. Yielding to popular pressure, the legislatures permitted these civil divisions of the state to lend their credit heavily to projected railways and other similar enterprises. Here, too, unwise management brought financial disaster. As a result, constitutional limitations were adopted by which municipalities and other local divisions of the states are forbidden to lend their credit or to incur indebtedness beyond certain fixed limits.

Limitations upon banking legislation

In a somewhat similar manner, the earlier banking experiences of the states—especially abuses arising out of state participation in banking and out of the legislative grant of bank charters—produced a series of constitutional limitations upon the passage of state banking laws. In this matter the legislatures acted unwisely, but they acted under pressure of the people and can not be held entirely responsible for the abuses that resulted. In fact, the Illinois constitution of 1818 expressly required the establishment of state banks. Upon the

[1] For a full review of this whole subject, see Horace Secrist, *An Economic Analysis of the Constitutional Restrictions upon Public Indebtedness in the United States.* University of Wisconsin Bulletin, Economics and Political Science Series, Vol. 8, No. 1 (1914).

CHAP. V

failure of such banks, the constitution of 1848 expressly forbade such institutions, and imposed strict limitations upon the passage of state banking laws. The people insisted upon legislative policies that resulted in disaster, and then, after the injury had been done, they imposed strict limitations upon their legislatures.

Special legislation

During a large part of the history of American states, great abuses resulted through legislative action granting charters to municipal and private corporations, and in the passage of other types of local and special legislation. Such legislation was often passed in unsatisfactory form, and in such a manner that the interests affected had no real notice of what was being done. On account of abuses in these matters, we now have in most states a series of strict limitations upon local and special legislation, and upon methods of legislative procedure.[1]

Other limitations

Limitations have steadily grown in number, and have decreased the power and influence of state legislative bodies. Popular distrust of legislatures has been fostered in part by measures the enactment of which was forced by popular sentiment, and in part also by the incompetence of the legislatures themselves. Constitutional provisions have at the same time limited the length of legislative sessions, and provided that such sessions be held biennially (and in Alabama quadrennially), rather than annually as under the earlier constitutions. Annual sessions, however, remain in a small group of the states. Recently there has been a tendency to remove some of the restrictions upon legislative power, and expressly to authorize the passage of state laws with respect to many problems of new social importance. Not only this, but constitutional amendments in a number of states, particularly with reference to road construction, have authorized state bond issues, and have thus reduced the limitations upon state indebtedness.

[1] See C. C. Binney, *Restrictions upon Local and Special Legislation* (Philadelphia, 1894).

POPULAR PARTICIPATION IN GOVERNMENT

Property qualifications

Throughout the whole history of American state constitutions there has been a steady tendency to extend popular participation in government. The American Revolution was in its earlier stages a democratic movement, and in several states it led to an extension of the suffrage and to the reduction of property qualifications for the holding of office; but control of the earlier state governments was confined in great part to the propertied classes. A number of steps in constitutional development have altered this situation. The movement for the extension of the suffrage and for the abolition of property qualifications for voting gained force about 1800, and became triumphant during the first three decades of the nineteenth century, although Virginia held out until 1850. This movement for the extension of the suffrage has more recently been successful in obtaining full equality of voting power for women throughout the country. The movement toward a more extended suffrage has been somewhat modified by the tendency to impose restrictions in the South, primarily for the purpose of reducing the negro vote; by the development of educational tests in some cases; and by the withdrawal of the right to vote from non-citizens in a number of states.

Argument against removal of restrictions

In 1821 there was a vigorous debate in the New York constitutional convention upon the question of reducing qualifications for voting for state senators. Chancellor Kent said: "I hope, Sir, we shall not carry dissolution through all the departments of the fabric erected by our fathers. I hope we shall not put forward to the world such a new constitution as will meet with the scorn of the wise and the tears of the patriot." The New York constitutional convention of 1821 nevertheless reduced property qualifications for participation in government. By 1850 the movement was complete in the state of New York, except with respect to the colored voter.

CHAP. V

Qualifications for office-holding

The movement for the abolition of property qualification for office covered much the same period as that for the abolition of property qualification for voting. The New York constitution of 1821 continued some qualifications of this character, but these also disappeared in that state before 1850. The movement for equality with respect to voting power and office-holding, independently of property, was favored by men like Jefferson and Jackson, but opposed by Chancellor Kent and Chief Justice Marshall.

Popular election of officers

Reference has already been made to the constitutional development leading to the popular election of state executive officers and of judges. This movement also led at much the same time to the popular election of substantially all local officers throughout the country. This plan of making a great mass of officers, both state and local, popularly elective, was regarded as a movement in the direction of popular control over government. But, with so many officers to be elected, the individual voter has been overburdened. There is now a tendency to reduce the number of elective officers, and to choose by ballot only those state and local officers who have an important function in the determination of governmental policy, giving to these more important officers the responsibility for the appointment of those who are to occupy less important positions.

Initiative, referendum, and recall

The introduction of the initiative and referendum in twenty states, and the adoption of the referendum in two others, involves a very greatly increased popular share in the conduct of government. These twin devices of direct government were first adopted by South Dakota, in 1898. The recall of public officers may also be classed with the initiative and referendum. The recall was first adopted by Oregon in 1908, and has since been adopted by ten other states.

Municipal home rule

The movement for municipal home rule—for the framing of charters by cities themselves—began in

Missouri in 1875, and has spread to twelve other states. In these states, cities are, under certain conditions, permitted to frame and adopt their own charters of municipal government; and, in a number of these states, cities are also expressly granted large powers with respect to their own local affairs.

Popular voting upon constitutional changes

The machinery for changing state constitutions has from an early date involved popular voting upon complete constitutions or upon proposed amendments to such constitutions. With the increase in the number of matters dealt with by state constitutions, and the consequent increase in the number of constitutional changes submitted to popular vote, there has also come a definitely larger share upon the part of the people in the affairs of government. Not only this, but in many states that do not have the initiative and referendum by constitutional provision there is under state constitutions and state laws a great deal of voting, throughout the state as a whole or by subdivisions of the state, upon matters of governmental policy.

CHARACTER OF PRESENT STATE CONSTITUTIONS

Constitutions of forty-eight states

The constitutions now in force in the forty-eight states vary a great deal in length and in content. Some were adopted in an earlier period, and some bear recent dates. Massachusetts still boasts that it is governed by the constitution of 1780; but this constitution has been altered in form by so many amendments that it would hardly be recognized by its original framers. By amendment or by the adoption of new constitutions, the states have steadily readjusted their institutions to meet changing needs. In this readjustment, and particularly in the adoption of constitutions by newly admitted states, there has been much copying of constitutional provisions of one state by another. The constitution of the United States, framed in 1787, was not a new document, but was largely

CHAP. V

based upon state constitutional experience prior to that date. Once the national constitution was adopted, it established a model for much of the development in the field of state constitutional history, particularly with reference to the establishment of three coördinate departments of government. State constitutions have not copied the constitution of the United States in the matter of brevity, but have gradually tended to be more and more lengthy.

Copying of provisions

The Vermont constitution of 1777 was largely the Pennsylvania constitution of 1776. The New Hampshire constitution of 1784 copied freely from the Massachusetts constitution of 1780, as did also the Maine constitution of 1819. The Nebraska constitution of 1875 borrowed liberally from the Illinois constitution of 1870. When one state has copied from another, it has not always copied slavishly; and it is impossible to trace the present constitution of any one state directly to a source in a single constitution of another state. Usually the copying has been more general. Illinois in 1818 borrowed somewhat freely from the constitutions of New York, Kentucky, Ohio, and Indiana. The framers of the first Illinois constitution copied from New York the provision for a council of revision to exercise a veto power upon legislation, at just the time when New York was about to abandon this plan.

Nebraska as an illustration

It is out of the question to analyze in any detail the constitutions of all of the forty-eight states. It may be worth while, however, to outline briefly the government of the state of Nebraska, under the constitution of 1875, as amended some eleven times before 1920, and as further amended by forty-one changes proposed by the constitutional convention of 1920. This constitution is fairly typical because its original text represents the attitude of fifty years ago, while its recent amendments reflect present tendencies. The original constitution of

1875 occupied about thirty pages in Thorpe's collection, and by amendment is now much longer.

Legislative powers

The Nebraska constitution contains the usual declaration as to the separation of powers of government; and it has a bill of rights, with modifications now somewhat characteristic of the western states regarding the use of the jury and the grand jury. This constitution provides for the initiative and the referendum. As amended in 1920, it provides full male and female suffrage, and contains no property qualifications for office. It organizes a two-chambered legislature, with members elected for two years, and with a regular session each two years. There are detailed limitations on the legislature as to special legislation, procedure, and various other matters. The governor is given a veto power with respect to legislation and items of appropriation.

Executive organization

The constitution provides a detailed organization of the state executive, requiring an elective governor, lieutenant-governor, secretary of state, auditor of public accounts, commissioner of public lands and buildings, treasurer, attorney-general, and superintendent of public instruction. The superintendent of public instruction is elected for four years; the other state executive officers are chosen for two years. Provision is made for appointment by the governor of the heads of executive departments established by law, with the consent of the two houses in joint session, and the legislature is forbidden to make appointments. A budget is to be presented by the governor. Appropriations in excess of those recommended by the governor may be made by a three-fifths vote of each house without being subject to the governor's veto.

Executive boards

With respect to other functions that may properly be termed executive, the constitution expressly provides for a board of pardons composed of the governor, attorney-general, and secretary of state; a board of control of

CHAP. V

state institutions composed of three members appointed by the governor, each for six years, with overlapping terms, but with approval by two thirds of the Senate; a state railway commission of three members, each elected for six years, with overlapping terms; a tax commissioner, to be appointed by the governor with the advice and consent of the Senate; a board of commissioners for the handling of educational lands and funds, composed of the governor, secretary of state, attorney-general, treasurer, and commissioner of public lands and buildings; a board of six regents of the University of Nebraska, elected from districts for terms of six years each; a board of education of state normal schools, composed of six members appointed by the governor with the advice and consent of the Senate, each for six years, but with overlapping terms, the superintendent of public instruction to be an *ex-officio* member of this board.

Courts

The constitution contains a detailed organization of courts, but with power in the legislature to create other courts inferior to the supreme court, and to replace justices of the peace. As amended in 1920, the constitution also vests a large degree of rule-making power in the supreme court.

Other provisions

It makes detailed provision for schools; establishes rules as to the tax system of the state, and with reference to tax exemptions, tax sales, county tax rate, and local taxation; contains details as to the regulation of railroad corporations; makes provision as to municipal corporations, specifically providing for municipal home rule; contains regulations as to general corporations, including banks; and imposes definite limits on state, county, and municipal indebtedness. The document also contains provisions regarding water rights; and expressly authorizes legislation with respect to the employment of women and children, and with respect to the minimum wage.

The Nebraska constitution of 1875 was very difficult to amend. Before 1912 amendments had been obtained only by means of a subterfuge that in fact violated the constitutional requirements. The adoption of the initiative and referendum in 1912 made it easier to adopt amendments through proposal by initiative petition; and by a change adopted in 1920, this greater degree of ease in amending the constitution has been extended to amendments proposed by legislative act.

Method of change

This detailed enumeration of the provisions contained in the Nebraska constitution may serve to illustrate the general character of present state constitutions; for, while no one of them can be regarded as typical, the constitution of Nebraska as it now stands is fairly representative from the standpoint of length, and generally from the standpoint of content, although the initiative and referendum have not been adopted in a majority of the states. Oklahoma and a number of other states have longer constitutions than Nebraska, and thus find it possible to place more detail in the constitutional text. On the other hand some constitutions are briefer and less detailed.

No state constitution typical

The state constitution has come to be an elaborate law of relatively permanent character, dealing not only with fundamental matters affecting state government, but also with many details of state policy. There are styles in state constitutions, as in other human affairs. It has been the fashion for a number of years to embody in a new constitution any matter in which the people of the state are greatly interested at the time. In all of the constitutions adopted about 1870, detailed provisions for the regulation of railroads and of other corporations will be found. Present tendencies in state constitution-making are to include provisions for the initiative and referendum; a state budget; municipal home rule; some rule-making power in the courts; a more unified judicial system; and to give greater legislative power with respect

Styles in state constitutions

CHAP. V

to salaries of state officers, the system of taxation, executive and judicial organization, and social legislation. During the past thirty years provisions have been placed in many state constitutions regarding matters of social legislation, such as hours of labor, workmen's compensation, and minimum wage. This has been caused by the reluctance of the courts to sustain new types of social legislation.

Constitution an accumulation of provisions

A state constitution is largely an accumulation of provisions that have been introduced at various times. Many of the present limitations upon legislatures prohibit actions which led to disaster before the limitations were introduced; but disaster does not usually present itself a second time in the same form. Constitutional limitations, once adopted, tend to persist, and are joined by other provisions designed to meet new situations. A constitutional provision is not apt to be removed unless it gives rise to difficulties that seem to make such removal necessary. A constitution sums up the views as to governmental needs at the time it was framed. At the same time, it perpetuates these views, along with many views of preceding generations of constitution-makers. Many provisions placed in constitutions are not required to be in constitutions as distinct from statutes, and in no way represent a distrust of legislatures. For example, the framers of the Illinois constitution of 1848 embodied in that instrument detailed provisions regarding judicial organization, taking these provisions largely from the then existing statutes of Illinois. As statutes these provisions were proper, and could have been readily changed; but the necessity for change in judicial organization made itself felt long before a somewhat more flexible judicial system was provided for in the next constitution (1870). The detailed constitutional system adopted in 1870 has in its turn been outgrown before being replaced.

Types of constitutional provisions

State constitutions now contain a great mass of provisions: (1) dealing with the organization and operation

of government, both state and local; (2) imposing limitations upon legislative power; (3) incorporating into the constitution matters of legislation that at the time of the framing of the constitution were regarded by the framers as proper; (4) specifically granting powers to the legislature; (5) requiring that the legislature take certain actions.

Legislation in constitutions

A greater and greater amount of legislation has tended to come into constitutions. The constitution-makers of Virginia, Oklahoma, Arizona, and New Mexico have provided in detail for the creation of corporation commissions that unite the powers of all three departments of government. Legislation creating such commissions could not have been enacted unless the constitution had made an express exception for this purpose from the principle of the separation of powers. If constitution-makers desire to provide for such corporation commissions, they have the alternative of placing in their constitutions a provision authorizing the legislature to create such a commission or of putting the details regarding the matter into the constitution itself. The constitution-makers of Virginia and Oklahoma placed these detailed provisions in the constitution, and at the same time made them alterable by legislative action after a certain period of time.

The function of the present state constitutions

Present state constitutions are highly detailed. Placing a provision in a state constitution sets up an additional handicap to change. If it is substantially impossible to change the constitution, this handicap presents a serious bar to progress. The framers of many constitutions in the United States have made the mistake of the Illinois convention of 1870 and of the Nebraska convention of 1875. They have framed constitutions containing much of temporary detail, whose change would be practically necessary with changing conditions, and at the same time have adopted provisions for the amendment of these constitutions upon the apparent assumption that

CHAP. V

a constitution is a body containing only matters of fundamental and permanent importance. The newer state constitutions are to a large extent not fundamental law in any proper sense, but this does not necessarily condemn them. In order to determine the usefulness of the detailed state constitutions, we must inquire, first, what such constitutions now do; and, second, how well they perform their present functions. The state constitution now serves two purposes in most of the states—that of organizing and determining the powers of government, and that of serving as an organ of popular will through the embodiment of legislation in the constitution itself. The newer constitutions have organized departments and organs of government in detail and have themselves enacted new legislation. Their work in these fields has not been less satisfactory than that of the legislatures, but the work of legislatures is easier to change; and this represents the fundamental difference in function between state legislation and state constitutions. If state constitutions are to continue to be lengthy documents, dealing to a large extent with matters of a temporary character, this must be recognized; and these constitutions, or their provisions of less permanent character, must be made substantially easy to change. There seems to be no tendency at present to reduce the length of constitutions; and this points to the necessity for relatively easy methods of change. When a constitutional convention assembles, all of its members are theoretically in favor of brief constitutions containing only matters of fundamental importance; but each member is in favor of detailed provisions upon the matters in which he is specially interested. The result is that all of the members unite upon a constitution longer than the one that they are seeking to replace. If constitution-framers do this, they must at the same time be brought to realize the necessity for an easier method of changing constitutional detail.

METHODS OF CHANGING CONSTITUTIONS [1]

Distinction between constitution and statutes

When the first state constitutions were adopted, there was no sharp distinction between constitutions and the ordinary work of law-making. Three of the first state constitutions were framed by purely legislative bodies, without any authority whatever from the people of the states for this purpose. Five were framed under authority expressly conferred for this purpose, but without any submission to the people for approval; and five others were framed by bodies expressly authorized to frame constitutions, with a subsequent formal or informal submission to the people. Only two of the earlier state constitutions, that of Massachusetts (1780) and that of New Hampshire (1784), were framed by bodies specially chosen for the purpose and then approved by popular vote. Eight constitutions of the revolutionary period made express provision for their amendment, but the amending provisions in most of these states were ineffective. The idea that a constitution is something sharply different from ordinary legislation rapidly developed, and by 1850 the framers of constitutions indicated by the amending clauses which they adopted that they regarded constitutions as documents of a distinctly fundamental and permanent character. Constitutions became extremely difficult to amend at the very time when they were coming to contain more of legislative detail requiring frequent change. In more recent years the framers of constitutions have awaked to the fact that a detailed constitution requires a relatively easy method of change; and an easier method for the changing of constitutions has tended to accompany the more detailed constitution. This has been particularly true in the states that have

[1] See the author's *Revision and Amendment of State Constitutions* (Baltimore, 1910); and Constitutional Convention Bulletin Nos. 1 and 3, issued by the Illinois Legislative Reference Bureau in 1919, on *The Procedure and Problems of the Constitutional Convention* and *The Amending Article of the Constitution.*

CHAP. V

adopted the plan of proposing constitutional amendment by initiative petition.

Methods of change

Three methods of constitutional change have developed in this country: the constitutional convention; legislative proposal of specific amendments; and the proposal of such amendments by initiative petition.

Constitutional conventions

The constitutional convention is the method ordinarily employed for the complete revision of a constitution. It is the only method that can be employed in New Hampshire, and provision is made in that state for a popular vote each seven years upon the assembling of a constitutional convention. Most of the state constitutions contain express provisions regarding the assembling of constitutional conventions; and most of those having such provisions expressly require that the question of calling a convention be submitted to the voters, and also that the work of conventions be submitted to popular vote for adoption. Several states other than New Hampshire require the question of calling a constitutional convention to be submitted at certain regular intervals, usually every twenty years. Twelve state constitutions contain no provision whatever for constitutional conventions; but in all of these except Rhode Island it seems to be fully established that in the absence of such provision the legislatures may provide for the calling of a convention. A judicial decision in Rhode Island takes the view that in the absence of constitutional provision a convention may not be assembled; and Rhode Island is the one state, therefore, that may not employ a constitutional convention for the purpose of revising its constitution.

Submission of convention's work

In many states the work of a constitutional convention is not expressly required to be submitted to popular vote, and constitutions have in late years been adopted in a number of southern states without popular approval. This plan was employed in Mississippi (1890); South Carolina (1895); Delaware (1897); Virginia (1902);

Louisiana (1898, 1913, 1921). Generally, however, in the absence of constitutional provision requiring it, the practice since 1830 has been to submit proposed constitutions for popular approval before they come into effect. This is the more desirable and proper procedure.

Organization of conventions

Constitutions vary greatly in the extent to which they prescribe details regarding the composition of conventions and the election of delegates.[1] The New York constitution of 1894, the Michigan constitution of 1908, and the Missouri constitution, as amended in 1920, make a convention completely independent of legislative action, if it is assembled as a result of the periodical votes required to be had every twenty years upon the subject in these states. This independence of the convention was first provided for in New York in 1894, because of the fact that, although the people of the state voted in favor of a convention in 1886, political differences delayed the legislative authorization, so that the convention did not actually assemble until 1894.

Quality of their work

The work of constitutional conventions is done by a single body made up of popularly elected members, chosen ordinarily from districts employed for the election of members of one branch or the other of the state legislature, although delegates from the state at large are occasionally provided, as in the New York convention of 1894. It has not been found necessary to organize constitutional conventions into two houses, as the regular legislative bodies have been organized. Elected for the one specific purpose of acting upon changes in a single document, and with usually the check of a popular vote upon them, constitutional conventions have ordinarily done their work well. This has by no means always been due to a superiority in the character of their membership, but rather to the fact that conventions

[1] For details regarding the provisions for constitutional conventions see the *New York Index-Digest of State Constitutions;* and Illinois Constitutional Convention Bulletin No. 3, on *The Amending Article of the Constitution,* p. 190.

CHAP. V

have a much better opportunity to do a satisfactory task than do American state legislatures under present conditions. The members of conventions have been chosen in Ohio, Nebraska, and in some other states upon a non-partizan ticket, in the effort to avoid purely political considerations. However, conventions have in many cases framed legislative apportionments and other devices in the interest of the party to which a majority of their membership belonged.

Work has been over-praised

But it should not be assumed that the work of conventions has been thoroughly efficient. Their accomplishments have been overpraised. They have ordinarily been content to follow rather than to lead, and little of constructive statesmanship has developed in constitutional conventions. They have imposed limitations upon legislative authority, in order to prevent the continuance or repetition of legislative policies that have failed. They have embodied in their constitutions details of policy recognized as desirable at the time the convention itself has been sitting. As organs for effective state governmental policies of a permanent character, they have largely failed; although this may merely be equivalent to a statement that they have been little, if at all, in advance of the political intelligence of the times in which they have acted. There is no conclusive evidence that, on the whole, the work of constitutional conventions has been superior to constitutional changes proposed by the regular legislative bodies and adopted by popular vote. Conventions have to too great an extent taken the view expressed by Mr. Scholfield in the Illinois constitutional convention of 1870:

"It is assumed that when we depart from this hall all the virtue and all the wisdom of the state will have departed with us. We have assumed that we alone are honest and wise enough to determine for the people the ordinary, and in many instances even the most trivial, questions affecting the public welfare; as if the mass

of people of the state of Illinois were not as competent hereafter to select others that are honest and capable as they were to select us."

Form of submitting convention's work

Most of the conventions have submitted their work as a single document, but this plan has not been favored in recent years. Constitutional conventions in a number of states have preferred to submit their work in the form of a series of constitutional amendments, rather than as a proposed new constitution. This plan has been followed in Massachusetts since 1780, and has been followed in New Hampshire since 1792. Conspicuous instances in which it has been employed in recent years are presented by the Ohio convention of 1912, the Massachusetts convention of 1917-18, and the Nebraska convention of 1920. Illinois in 1870 submitted a complete new constitution, but also submitted for a separate vote all of the larger controversial issues involved in the measures proposed.

Change through legislative action

The process of constitutional change through proposal by the regular legislative body is almost as old as state constitutions themselves. The Maryland constitution of 1776 provided that the constitution should not be changed "unless a bill so to alter, change or abolish the same shall pass the General Assembly, and be published at least three months before a new election, and shall be confirmed by the General Assembly after a new election of delegates, in the first session after such election." The Delaware constitution of 1776 permitted constitutional changes by an extraordinary majority of the members of the two houses. The Maryland plan for amending the constitution was for a while copied by other states; but with the growing strength of popular government it soon seemed desirable that changes in the constitution should be directly submitted to popular vote. Such a plan was adopted by Connecticut in 1818, and by Alabama in 1819. In providing for amending their constitutions through legislative pro-

CHAP. V

posal, the states at first required the action of two successive legislatures, followed by a popular vote; but the more modern tendency has been to require the action of the legislature at only one session, and then to submit the proposal of the legislature directly to popular vote.[1] The more general requirement is that legislative action proposing a constitutional amendment shall be taken by an extraordinary majority of the members of the two houses, the more common requirement being a three-fifths or a two-thirds vote. Among the states that require the action of two successive legislative bodies, it is more common not to require such an extraordinary vote in the two houses. The more usual practice is also to provide that a proposed constitutional amendment may, when submitted for popular action, be adopted by a majority of those voting upon the question. In the matter of amending their constitutions, as in almost all other respects, state constitutions vary a great deal in detail; but the general tendency is to permit the proposal of amendments by an extraordinary majority of the two houses at one legislative session, and to provide for the adoption of such a proposed amendment upon the vote of a majority of those voting upon the proposal. Delaware is the only state that now provides for constitutional amendment without popular vote. That state still has a plan of amendment similar to the plan adopted by Maryland in 1776, requiring action by two successive legislative sessions without popular vote.

Restrictions upon the amending process

The whole tendency with respect to the process of constitutional amendments through legislative proposal has been to make this process of amendment simpler and easier. The states that require the action of two successive legislatures in order to propose amendments for a popular vote do, of course, interpose by this very fact a greater amount of delay in the submitting of pro-

[1] In Mississippi and South Carolina, legislative action is necessary even after popular approval of proposed amendments.

posed constitutional changes to the people; but mere delay is not so material, particularly when, as in New Jersey and New York, this plan of proposal through two successive legislative actions is coupled with annual legislative sessions. Other types of limitation in some of the constitutions make the amending process much more difficult. In some states, notably in Indiana and Illinois, there are constitutional limitations upon the number and character of legislative proposals, coupled with the requirement that a proposed amendment, in order to be adopted, shall obtain a majority of the votes of all persons voting in a general election. These limitations make constitutional amendment difficult and often substantially impossible. Vermont forbids the proposal of constitutional amendments oftener than once in ten years; and this also adds in a very material way to the rigidity of constitutional provisions.

States having severe restrictions

The most serious restrictions upon the adoption of constitutional amendments are those in the states which require that popular approval of amendments be by a majority of all those voting in a general election. In some states this very material handicap to constitutional change is accompanied by other restrictions as well. For example, Indiana requires a majority of all those voting in a general election, and couples this with a requirement of action by two successive legislatures, and with a provision that no new amendment shall be proposed while another amendment is pending. In states that, like Vermont, Illinois, and Indiana, impose serious burdens upon the methods of constitutional amendment, detailed constitutions have imposed a substantially insuperable obstacle to progress in many directions. The same has been true in Tennessee, where similar restrictions exist. Here, a majority of all votes cast in an election is required; amendments may be proposed only once in six years; and the action of two successive legislatures is required for such proposal. Although it is true that

CHAP. V

the process of constitutional amendment through legislative proposal has tended to become simpler with the increasing detail contained in constitutions, this statement does not apply to a number of important states. Among these are not only those enumerated above, but Alabama, Minnesota, Oklahoma, Rhode Island, and Wyoming. Rhode Island requires that an amendment shall receive the affirmative votes of three fifths of the electors voting upon the proposal. New Hampshire does not permit constitutional amendment through legislative proposal, but requires that amendments proposed by a constitutional convention shall be approved by two thirds of the qualified voters voting thereon. Constitutional amendment in Vermont is difficult, not because of any restrictions based upon the requirement of popular vote, but because of the limitation that amendments shall not be proposed oftener than once in ten years. The Mississippi and Arkansas constitutions may be amended through proposal by popular initiative petition, without the requirement of a majority of all of those voting at a popular election; but this requirement still applies to amendments proposed by legislative action.

Relations between convention and legislative proposal

All of the states except New Hampshire permit constitutional amendment through legislative proposal. Most of the state constitutions providing for the amendment of constitutions through legislative proposal make a clear distinction between this method of change and that of revision through a convention, by providing for a separate popular vote upon each change proposed as a result of legislative action. Some constitutions do not expressly limit the legislative proposal method to the recommendation of specific and individual changes in the constitution, and efforts have occasionally been made to bring about complete constitutional changes through legislative proposal. A proposed complete revision of the constitution was drafted by legislative action in Connecticut, but was rejected by popular vote

in 1907. In Rhode Island the use of a constitutional convention is prevented by judicial decision, and the action of the Rhode Island legislature in submitting a revised constitution to the people in 1898 and 1899 therefore seems a proper procedure; although this instrument was twice rejected by popular vote. The Michigan legislature submitted a proposed constitution to the people in 1874, but this document was also rejected by popular action. Where the two methods of constitutional change are provided for by the constitution, or where, even though the two are not definitely provided for by constitutions, both methods may be employed, it seems more proper that conventions should be employed for complete revisions, and legislative proposal for less complete and more detailed changes.

Experience in Indiana

In Indiana express provision is made for constitutional amendment by legislative proposal, although this provision is substantially unworkable because of the various restrictions imposed upon it. The Indiana constitution makes no provision for a constitutional convention; and the Indiana legislature of 1911 sought to submit to the people a complete constitutional revision. The state supreme court held, however, that legislative power was so limited that a complete constitution could not be submitted, and enjoined the popular submission of the proposed constitution drafted by legislative action.[1] The Indiana legislature later attempted to assemble a constitutional convention without a popular vote upon the calling of such a convention, and such action was again enjoined by the supreme court of the state, on the ground that although no constitutional provision existed for the calling of a convention, no convention could be called without the submission of the issue to a popular vote.[2]

[1] Ellingham *v.* Dye, 178 Ind. 336 (1912).
[2] Bennett *v.* Jackson, 186 Ind. 533 (1917).

CHAP. V

Unwritten constitutional law

The Indiana experience in the effort to obtain a new constitution, either through legislative action or through constitutional convention, calls attention to the fact that with respect to constitutional conventions we have developed a large body of constitutional law not to be found in the text of constitutions. Most of the constitutions do provide for two methods of constitutional change. A large number of constitutions, however, do not provide for constitutional conventions; and in all of these states except Rhode Island it is recognized that constitutional conventions may be assembled. In the states not having express provisions for constitutional conventions, the assembling of conventions is in the hands of the legislatures. The Indiana supreme court, without the support of any state constitutional provision, has said that it is proper to have a constitutional convention in that state, but that it is improper to have such a convention without a prior popular vote upon the question. In all of the states whose constitutions do not expressly provide for the assembling of conventions, the law regarding the assembling and powers of conventions is the result of governmental practice, or of judicial decisions not based upon express constitutional provisions.

Constitutional commissions

There has been a growing tendency to set up commissions charged with making preliminary investigations in advance of the assembling of conventions or before the legislative proposal of important constitutional changes. Such commissions were employed in New York in 1872, in Michigan in 1873, and more recently in Vermont and Pennsylvania.[1] Vermont in 1919 provided for a commission to report upon proposed amendments that might be acted upon by the legislature of that state in 1921. In 1919 the Pennsylvania General Assembly provided for a commission on constitutional revision and amendment, whose duty it was to consider all changes

[1] With respect to other uses of constitutional commissions, see Dealey, *Growth of American State Constitutions*, p. 146.

that might be thought desirable in the constitution of that state. The commission made a careful investigation and held numerous sessions. It reported late in 1920, and in the following year the Pennsylvania General Assembly provided for the calling of a constitution convention to act upon the numerous changes recommended by the commission, the work of this convention to be then submitted for popular approval of the people of the state. In providing for a constitutional convention in Pennsylvania, the General Assembly of that state made provision for a certain number of appointed members, and through this plan, and through the action of the governor, all of the members who constituted the commission were to be given an opportunity of sitting in the convention. However, after the commission completed its work, the people of the state rejected the proposal to call a convention.[1] Important work has been done in many states in making data ready and available for a constitutional convention. This has been particularly true in connection with recent conventions in New York, Massachusetts, and Illinois.

Amendment by petition

Within recent years the popular share in the amendment of state constitutions has been materially increased through the introduction in fourteen states of the initiative as a means of proposing constitutional amendments.[2] In some of these states a distinction is still preserved between the methods of law-making and of constitutional change, by providing a different method for the initiation of proposed constitutional amendments from that provided for the initiation of proposed laws. However, Oregon, Nevada, Missouri, Arkansas, Colorado, and Mississippi permit the use of the initiative petition for the proposal of constitutional amendments

[1] See note by William Draper Lewis in *American Political Science Review*, XV, 558-565 (1921).

[2] Arizona, Arkansas, California, Colorado, Massachusetts, Michigan, Mississippi, Missouri, Nebraska, Nevada, North Dakota, Ohio, Oklahoma, and Oregon.

CHAP. V

in the same manner as for the proposal of ordinary laws.

Fundamental and detailed provisions

To a large extent, the distinction in substance between state constitutions and state statutes has disappeared, through the practice of embodying detailed legislative enactments into constitutions. When there is a distinct popular interest in a matter over a period of several years, provisions as to that matter will find their way into some state constitutions. It may be urged that state constitutions should not contain detailed provisions designed to meet temporary needs; but the fact remains that most state constitutions do contain such provisions. As long as constitutions are filled with matters of legislative detail, which must necessarily be subject to frequent change, a constitution is defective that does not take this fact into consideration and make provision for such change. Of course it is true also that many matters of even an important and permanent character need to be changed at intervals, and that an amending clause must be adjusted to the possibility of such change. Many of the constitutional provisions that one hundred years ago were regarded as most fundamental and most permanent have in recent years been subject to question and to actual alteration. This is true, and properly true, with respect to the use of the grand jury and the petit jury. The principle of the separation of powers has been constantly altered in fact by a redistribution of powers among the three departments of government; and it is certain in the future to undergo still further alteration. But it is nevertheless true that when a large amount of temporary detail is placed in a constitution, such a course will, almost of necessity, force an amending process similar to the process of ordinary legislation.

Declining distinction between constitutions and statutes

The increased detail in state constitutions has been largely responsible for the disappearance in many states of the distinction between the methods of enacting stat-

utes and of changing constitutions. During the past twenty years this distinction has been materially weakened through the increased popular participation in legislation by means of the initiative and the referendum. In the earlier period of our constitutional history the most fundamental distinction between statutes and constitutional amendments was that amendments were required to be voted upon by the people, while statutes were infrequently submitted to a popular vote. Twenty states now have constitutional provisions for an initiative and referendum upon ordinary legislation, and two others have provisions for the referendum upon ordinary legislation. Many other states have provisions for the popular submission of particular types of state laws. The constitutions of six states expressly place the enactment of statutes through the initiative and referendum upon precisely the same basis as the adoption of constitutional amendments.

Function of the constitution

In the future adaptation of the state constitution there are two possible lines of development: (*a*) That of virtually abolishing the distinction in content between the state constitution and ordinary legislation, placing all desired detail in the constitution, and making the constitution substantially as easy to change as is an act of the legislature. Detail, once placed in a state constitution, breeds further detail. Some years ago an amendment to the constitution of California authorized the enactment of a primary election law, in order to overcome the effect of an unnecessary decision by the supreme court of that state. This amendment permitted the enactment of a particular type of law, and a new amendment was necessary when it was desired to enact a different type of law. California has also provided in great detail by her constitution for municipal home rule, and this detail has made further constitutional change necessary at frequent intervals. (*b*) The other possible plan is that of embodying in the constitution only matters of

CHAP. V

more distinct and permanent importance, at the same time retaining a rather sharp distinction between the form of enacting statutes and of amending constitutions. Even under this plan, a relatively easy method of constitutional amendment is desirable, but the amending process need not be so easy as under the first plan.[1]

Amending clause should be adapted to type of constitution

The determination of what type of amending clause is needed in an American state constitution depends altogether upon the type of constitution that is to be adopted. There is advantage in retaining a distinction between constitutions and statutes. Under present state constitutional provisions (except in Delaware), a popular vote is necessary for constitutional change. To increase the detail in the constitution, and to make the constitution subject to alteration only upon a popular vote, necessarily increases the number of measures upon which the people must be asked to express themselves; and most of these measures must of necessity be relatively unimportant, because much of the detail in state constitutions is itself relatively unimportant.

Increased popular voting

From the point of view of popular control in the field of state government, it is not very material whether we adopt a detailed constitution or a simple constitution, provided the amending process is adjusted to the type of constitution actually adopted. It is important, however, from the viewpoint of popular government that the people of a state be not burdened with the necessity of voting upon a great number of measures in which they can not possibly have a real interest. To burden the voter in this manner makes a travesty of popular government. In view of all the conditions, it therefore seems much more satisfactory to have a brief constitution confined to matters of really fundamental importance, as opposed to a lengthy constitution whose details must be amended through popular vote at frequent intervals.

[1] For a fuller discussion of this subject, see W. F. Dodd, "The Function of the State Constitution," in *Political Science Quarterly*, XXX, 201-221 (1915).

Extent of constitutional change

The state constitution is constantly changing. Changes take place at frequent intervals in some states; are less frequent in others; and in still others the constitutional text is substantially stationary. Since 1784 conventions chosen by the people for this purpose have been the organs for framing new state constitutions. The most important exception to this statement is the Nebraska constitution of 1866, which was framed by the territorial legislature and by this body submitted to a vote of the people. According to Judge Jameson's *Constitutional Conventions*,[1] one hundred and nineteen constitutions framed by constitutional conventions had come into operation before 1887. Since 1887, twenty-one constitutions framed by conventions have come into effect. There have, of course, been numerous cases in which the work of conventions has failed of popular approval. Since 1900, new constitutions have been adopted by seven states, and material changes in constitutional provisions have been proposed and adopted by conventions in three others. By the proposal of individual amendments, either by legislative bodies or through popular action, a great deal in the way of constitutional change has also been accomplished since 1900. More than 1,500 constitutional amendments have been proposed in the forty-eight states since 1900, of which about three out of five have been adopted. Between 1900 and 1918, 150 proposed constitutional amendments were submitted in California alone; 134 in Louisiana; 88 in Arkansas; 71 in Ohio; 57 in New York; 52 in Colorado and Georgia; 51 in South Dakota; and 50 in Michigan. In the field of taxation alone, more than 250 proposed amendments were submitted in the several states between 1900 and 1918, of which 142 were adopted. Certainly not more than one out of four of the proposed amendments in the several states related to any matter of fundamental importance. However, this is not the point here sought to

[1] Fourth edition, p. 550.

CHAP. V

be emphasized. Thomas Jefferson urged the necessity of reëxamining our political institutions once during each generation. Through constitutional conventions, or the process of individual amendment, the American states are constantly reëxamining and changing their political institutions. These changes relate chiefly to matters of detail, but in the development of state constitutions since 1776 many fundamental changes have taken place. The American state constitution is a human document; and the development of popular government and popular sentiment can to a large extent be traced in the changing character of state constitutional provisions.

Representation in conventions and legislatures

Most state constitutions have, by provisions for their own revision or amendment, made constitutional change an orderly process, to be carried on by methods prescribed in the constitutions themselves. In the decisions of the state courts will be found many statements to the effect that the people themselves have an inherent right to change their form of government, and provisions to this effect will be found in many constitutions. But what the courts have in *dicta* occasionally termed an inherent right has been harnessed to the machinery of express constitutional provisions; and these constitutional provisions are judicially enforceable. It may, therefore, be said that, where methods of constitutional change are provided for in the constitution itself, the people of a state have no inherent right to change their constitution independently of the methods so prescribed. In some states constitutional provisions or historical development have drawn a line between rural and urban representation, so that in the legislative bodies the greater part of the population of the state is under-represented and is controlled by a smaller rural population. The legislative proposal of constitutional amendments is clearly an ineffective means of correcting inequalities in legislative representation, for the ma-

jority in the legislative bodies will ordinarily desire to perpetuate its own supremacy. Constitutional conventions, when provided for expressly by the constitutions themselves, are ordinarily composed of delegates elected upon the representative basis already existing for the choice of legislative members. In states whose constitutions have no provision for conventions, the legislatures themselves may determine the manner in which delegates to conventions shall be chosen.

Problem of readjusting representation

Constitutional conventions are, therefore, not usually organized so as to bring about corrections due to inequality of legislative representation; rather, they reflect also in their membership the inequality that exists in the legislative body. In states that have adopted an unrestricted plan of initiative petition for the proposal of constitutional amendments, a method is provided for constitutional change independently of the existing state representative system; but in the states that desire to preserve an inequality of representation it is probable that an unrestricted plan for the popular initiation of constitutional amendments will not be adopted. This presents a serious problem in a number of states. Conditions call for a constitutional change. But the interests of the politically dominant groups in the state oppose such a change; and these interests also control the machinery for making changes. The issue between urban and rural communities, as such, is not a serious practical one, but has in the main been created in a number of states for political purposes, or has grown up (as in some of the New England states) over a long period of years. The maintenance or establishment of a permanently unequal representative system is more apt to lead to serious difficulties than are largely artificial issues of policy between large and small communities. This problem is one that remains for future solution. Where their constitutions provide for an orderly method of constitutional change, the states must adhere to that method.

Even though the constitutions do not provide for orderly methods of constitutional change, revolution as an instrument for political action is difficult, if not impossible, to the states under our federal system. The Dorr rebellion in Rhode Island demonstrated the ineffectiveness of this remedy for political ills.[1]

[1] See Mowry, *The Dorr War or the Constitutional Struggle in Rhode Island* (Providence, 1901). See also Luther *v.* Borden, 7 How. 1 (U. S.). For an argument in favor of a constitutional right to disregard constitutional provisions with respect to amendments, see Amos C. Miller, "Curbing a Metropolis in a Constitution," *Journal of the American Bar Association*, January, 1920.

NOTE TO CHAPTER V

J. A. Jameson's *Constitutional Conventions* (4th edition, Chicago, 1887) is still useful. A later book upon the same subject is Roger Sherman Hoar's *Constitutional Conventions* (Boston, 1917). The author of this volume expects to issue in the near future a new edition of his *Revision and Amendment of State Constitutions.*

Every student of state government should be familiar with the constitution of his own state, and with the more important steps in its development.

It would be an interesting exercise to make a list by dates of all state constitutions, and to compare the more important provisions of the documents adopted at different periods. Jameson's *Constitutional Conventions* contains a list of all conventions assembled in the states prior to its publication.

CHAPTER VI

THE LIMITS OF STATE GOVERNMENTAL POWER

CHARACTER OF LIMITATIONS

State and national limitations

STATE government is subject to two sets of limitations: (*a*) those imposed by the constitution of the United States, or as a result of the powers exercised by the national government under that constitution; and (*b*) those imposed by the constitution of the particular state. Those imposed by the state constitution are capable of change at the will of the state; though the means of expressing this will are in some cases cumbersome and inadequate. The individual state has no means of changing limitations that arise from its being a member of the federal union, except as it unites with other states in bringing about an amendment to the constitution of the United States.[1]

Limitations in the interest of national power

There are several types of limitations imposed upon the state by the fact that it is a member of the federal union. Certain express limitations upon state powers are imposed for the purpose of protecting the powers of the national government. Among such specific limitations are the prohibition of state duties on imports and exports, the prohibition of preferences with respect to commerce with other states, and the prohibitions against states entering into treaties and coining money.

Concurrent powers

The chief limits imposed upon the state by the fact of its being a member of the federal union are, however, indirect limitations resulting from grants of power

[1] Of course changes in national law may leave a greater sphere of powers to the states. The tendency of national legislation, however, has been toward a more complete exercise of national legislative powers.

CHAP. VI

to the national government. Certain of the powers granted to the national government are of such a character that they can conveniently be exercised by only one government; and such powers, when granted to the national government, are therefore exclusive of state powers. In many important fields the powers of state and nation are concurrent. In these fields the state may exercise powers along with the national government, subject to the superiority of national powers. In some large fields, such as interstate commerce, the courts have held national and state authority to be concurrent only with respect to certain matters. In the field of concurrent powers, as long as the nation does not exercise powers the states may do so, but they may in no case exercise powers that conflict with the superior authority exercised by the national government.

National government exercises its powers more fully

Within the field of concurrent authority, the scope of state powers has been steadily reduced through the increased tendency of the national government to occupy the whole field of its powers. Each time the national government occupies, by legislation or otherwise, a field of activity open to it, but previously left to the control of the states, it proportionately reduces the powers of the state. The limits of state powers are therefore not to be found merely in the constitution of the United States, but in that constitution together with the laws and treaties through which the exercise of national power has been extended.

National limitations affecting the individual

Amendments to the constitution of the United States have enlarged national powers as to certain matters of general policy. The Fifteenth and Nineteenth amendments limit state power, by forbidding discrimination in voting power because of race, color, or previous condition of servitude, or of sex. In addition to the limitations of the types just referred to, the national constitution as first adopted imposed certain safeguards in

the interest of private rights throughout the whole country. Of this type were the prohibitions of state bills of attainder, state *ex post facto* laws, and state laws impairing the obligation of contracts. The Fourteenth amendment, adopted in 1868, enormously extended the national guaranties of individual rights, through the provision that "no state shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." Through the Fourteenth amendment the protection of individual rights has become largely a matter of national policy.

Limits are to be found in written constitutions

Aside from the limitations imposed upon state governments by virtue of their membership in the national union, all limitations upon state governmental powers are to be found in the written state constitutions. Assertions have at times been made by state and federal courts that there are limitations upon both the national and state governments not to be found in the terms of written constitutions. The doctrine that there are natural rights, which are to be protected by the courts independently of any constitutional guaranties, has been important at times; but this doctrine has never gained much headway with the courts, for if they desire to find that state governments are limited in a particular way, it has always been possible for them to find, within the written constitutions themselves, broad provisions that would serve as a basis for discovering the desired limitation. It must therefore be concluded that we are to find all limitations upon state governmental powers in the constitution of the United States and in the powers properly exercisable by the national government under that constitution, or in the written state constitutions.

Powers of the three departments

In the construction of state constitutions, it has been assumed that the executive and judicial departments have only such powers as are conferred by the constitution it-

CHAP. VI

self, or by legislative acts not in conflict with the constitution. The legislative department, on the other hand, is assumed to possess all the powers of the state not forbidden to it, directly or indirectly, by the state constitution. The great body of state governmental power is therefore exercised by means of legislative acts. To a large extent, the executive and judicial departments are organized by such acts. Some state constitutional limitations directly restrict the executive and judicial departments, and some impose direct prohibitions upon local governments, as with respect to local taxes and local debts. However, there are very few direct restrictions upon the executive and judicial departments, and relatively few restrictions that operate directly upon the local subdivisions of state governments.

Limitations upon legislature

Almost all of the express limitations to be found in state constitutions are limitations upon state legislative power. This has been the natural development, for the state legislative department is the organ for the development of governmental policies. The judicial department to some extent, and the executive department to perhaps a greater extent, may develop something of governmental policy; but these departments are limited in their activities to the powers granted them by the constitution or by legislation. If the state government is to be limited, it is natural that the limitations should be directed primarily against that organ of government which has capacity to act. For this reason the study of state government and of its development in this country is largely a study of the development of limitations upon legislative powers. The steady limitation of legislative powers has been the one dominant feature of state constitutional development. The express limitations upon state legislative power are numerous and have steadily increased. These limitations have to do largely with the incurring of debt, the making of appropriations, local and special legislation, and matters of legislative procedure.

Legislative power limited by details in constitution

But not all limitations upon state legislative power are found in the form of express prohibitions. Constitutions now contain details as to the organization of the departments of state government, and with respect to the organization of local government. They also announce numerous state policies. Before being placed in the text of the constitution, subject only to change by constitutional amendment, these matters were subject to legislative control. Placing them in the constitution reduces the scope of state legislative power. Many of these provisions have not been placed in constitutions for the direct purpose of limiting legislative power, but necessarily have that effect. Through express limitation or otherwise, a great mass of constitutional limitations has come to be placed both upon the procedure and upon the powers of state legislatures.

JUDICIAL ENFORCEMENT OF LIMITATIONS

Rule of judicial construction

The theory announced by the courts in the construction of state constitutions is that the state legislature has all power not clearly forbidden to it by constitutional provision. This is a theory of liberal interpretation in favor of legislative power. The practice of the courts has not been in accord with this theory. They construe every provision in a state constitution as limiting legislative power to the furthest possible extent; and this seems to have been in accord with the general sentiment of the people of the states, who, in framing and adopting constitutional changes, have steadily added to the limitations upon legislative power. The state courts have therefore virtually taken the view that any language found in the state constitution is to be regarded as in some form a limitation upon legislative power, even though the framers of the particular language may have had no such object in view.

CHAP. VI

Practice of constitutional construction illustrated

An illustration may make this clearer. The framers of the Nebraska constitution of 1875 adopted this provision: "The legislature may provide by law for the establishment of a school or schools for the safe-keeping, education, employment, and reformation of all children under the age of sixteen years who, for want of proper parental care, or other cause, are growing up in mendicancy or crime." It is quite clear that the authors of this provision had in mind the encouragement of a certain type of institution, not the imposing of limitations upon legislative power. The supreme court of Nebraska, however, said that "state constitutions are not grants of power, but limitations of power. Such legislatures can exercise such powers as are not inhibited by the fundamental law. To construe the provision in question as a grant of authority is to impute to the framers the doing of a useless and idle thing."[1] The court therefore concluded that the legislature was forbidden to provide for the commitment to such a school of children over the age of sixteen. It required a constitutional amendment, proposed by the constitutional convention of 1920, to raise this age to eighteen years. A large number of the decisions of state courts materially restricting the powers of state legislatures fall within the type represented by this case. The constitutional law of the United States is primarily a body of laws dealing with powers of the national government, and it tends to emphasize and enlarge these powers. State constitutional law is almost entirely a law of limitations upon state legislative bodies. State powers are subject to two sets of limitations, and both state and national courts, when dealing with issues involving state constitutions, are likely to emphasize the limits upon state powers.

Changes in constitutional restrictions

The limitations of state constitutions are imposed by the state itself upon its organized government, and are of course subject to change through state constitu-

[1] Scott *v.* Flowers, 60 Neb. 675 (1900).

tional amendment or revision. When it is found that a limitation in the written text of the constitution works unsatisfactorily, or that such texts, as construed by the courts, are too restrictive of state powers, constitutional amendments change or remove the limitation. In this manner there has been a tendency in recent years to enlarge state legislative powers and to remove some of the limitations imposed in earlier days upon those powers; or to remove limitations which through state constitutional construction the courts have found to exist as against legislative power.

Judicial enforcement of constitutional limitations

A fundamental theory of American constitutional law is that constitutional limitations are subject to judicial enforcement.[1] This theory was originally developed by the courts without the aid of express constitutional authority. The Supreme Court of the United States quite early established its authority as the body to determine the limits of state power with reference to the national government—to preserve the balance as between national and state powers. Some authority must be provided in every federal system which will finally decide conflicts between national and state authority. The body for the decision of such issues in this country is the United States Supreme Court.

Federal and state courts

The principle of judicial control as a means of keeping legislative bodies within the terms of written constitutions is one that applies to both the national and the state governments. The United States Supreme Court in the exercise of its original jurisdiction, or on appeal from state courts or from inferior federal courts, decides finally whether laws enacted by the Congress of the United States are within the authority of that body, as well as whether state actions are in conflict with the constitution of the United States, or with powers be-

[1] Upon this subject see C. G. Haines, *The American Doctrine of Judicial Supremacy* (New York, 1914); and Jackson H. Ralston, *Study and Report for American Federation of Labor upon Judicial Control over Legislatures as to Constitutional Questions* (Washington, 1919).

CHAP. VI

longing to the United States government rather than to the states. The highest state courts decide finally for their respective states whether laws enacted by their legislatures are within the limits of their respective state constitutions. The power of state courts to pass finally upon the validity of laws enacted by the state legislative bodies has been exercised since 1780, and many of the American state constitutions now clearly recognize this authority. This power has been much more frequently exercised within recent years than in any earlier period. The increase in the extent of state judicial supervision over state laws has come about largely through the increase in the number of limitations imposed by the constitutions themselves upon state legislatures. It has also been due in part to the increased complexity of state constitutions. Under the idea that any provision in a state constitution must necessarily be regarded as a limitation upon state legislative authority, the state courts have been quick to discover restrictions upon legislative power as a result of all the detailed provisions that have come into constitutions with respect to the organization of government, as well as in constitutional provisions introduced in the state constitutions, not for the purpose of limiting legislative power, but for the purpose of making it clear that the state legislature has a certain power or should do certain things. The Nebraska case before referred to is of this type.

Doctrine of judicial review

The legislative department has authority to determine new governmental policies. It is therefore the body having the greatest opportunity to violate constitutional restrictions. No governmental body can be expected to enforce limitations against itself.[1] The American doc-

[1] This principle applies to all departments of government, although more strongly to that department having the greatest powers, and the most numerous limitations upon such powers. The courts are ineffective bodies to enforce the performance of duties imposed upon themselves. Several state constitutions require courts to report for legislative consideration defects that they may find to exist in the laws; but this constitutional command to the courts has been almost entirely disregarded.

trine of judicial control over legislation is based upon the assumption that the courts, as the bodies to construe and apply the law, should disregard any legislative act conflicting with the constitution. In the United States, therefore, we must look in judicial decisions in order to ascertain the meaning of constitutional provisions. The doctrine of judicial review is firmly established in this country.[1]

Small number of provisions not judicially enforceable

It should not be understood from the statements made above that the courts enforce *all* constitutional provisions. They have taken the view that certain constitutional provisions are merely directory to the legislature —that they constitute merely advice to the legislative body without being judicially enforceable. The guaranty to the states of a republican form of government by the constitution of the United States is not judicially enforceable, but is by the courts themselves said to be a political guaranty enforceable by the political, and not by the judicial, organs of government. The Ohio constitution requires that "no bill shall contain more than one subject, which shall be clearly expressed in its title"; but the Ohio supreme court takes the view that this command is addressed merely to the legislature, and is not enforceable by the courts. Except for a small number of provisions, however, it may be said that constitutions are in the United States enforceable by the courts, through the power to declare laws unconstitutional.

Judicial enforcement and political safeguards

Most of the other countries of the world that have written constitutions rely upon political safeguards, rather than upon the judicial enforcement of constitutional provisions. In the national and state governments of this country we have both political safeguards and judicial enforceability of substantially all constitutional

[1] For a discussion of this matter see W. F. Dodd, "Political Safeguards and Judicial Guaranties," *Columbia Law Review*, XV, 293-315 (1915). Control over legislation has also been exercised by the courts in Australia, Argentina, Greece, Norway, and Rumania, and is provided for by constitutions of several of the newer European countries.

CHAP. VI

provisions that may be in any way regarded as limiting legislative authority. Through the principle of the separation of powers, with the several departments serving as checks one upon the other, we have developed a system of political balances, while at the same time we have a final judicial construction of substantially all provisions of the constitution. The final authority of the courts to pass upon the validity of legislative acts is in itself one of the chief developments in the field of checks and balances as among the three departments of government.

Organization of federal control

In view of the fact that judicial control over legislation is one of the most fundamental of American political institutions, and the most important with respect to the limits of state governmental power, it will be wise to outline briefly the organization of judicial control over legislation so far as such organization affects state power. The United States Supreme Court is the final body in the federal system to pass upon the meaning of the provisions of the constitution of the United States, and, through the final interpretation of these provisions, to determine the extent to which state powers are limited either by the United States constitution or by the exercise of the powers of the national government under that constitution.

Inferior federal courts

Every inferior federal court has jurisdiction in issues involving matters of federal constitutional law. For a time it seemed as if the inferior federal courts would materially cripple state powers by the incautious use of injunctions to restrain the enforcement of state laws that were alleged to interfere in any way with the powers of the national government. With a number of United States district courts scattered throughout the country, each having unrestricted authority to issue injunctions restraining action under state laws, it was possible for unwise or incautious federal judges to restrict materially the powers of state governments. The action of inferior federal courts was, of course, not final,

but it controlled until a final decision of the issue could be obtained from the United States Supreme Court. In this manner powers undoubtedly belonging to state governments were materially interfered with. In order to prevent conduct of this sort on the part of inferior federal judges, legislation was passed by Congress in 1910 [1] materially restricting the power of federal judges in this respect. State laws, or action of officers of the state in the enforcement of state laws, may now not be enjoined on the ground of unconstitutionality, unless the application is heard and determined by three judges and a majority of the three concur in granting such an application. In this manner safeguards are thrown around the federal judicial control over state legislation and over state action under such legislation to such an extent that the dangers existing before the enactment of this legislation have substantially disappeared.

State courts

The constitution of the United States "and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." The judges of state courts are therefore quite as much obligated to enforce the constitution, laws, and treaties of the United States as are the federal courts. If state courts find that a conflict exists between the provisions of a state constitution or of state laws and the constitution of the United States or national laws or treaties, it is their duty to give priority to the national powers, and to declare of no effect state acts that interfere with such national authority.

Appeals from highest state courts

When the constitution of the United States was first adopted, it was assumed that state courts would substantially always decide in favor of state powers, when

[1] Amended in 1911 and now Section 266 of the Federal Judicial Code.

conflicts arose between national and state authority. Through a long period before the Civil War this was actually the case. In view of the situation, the Federal Judiciary Act of 1789 provided that writs of error might be taken from the highest state courts to the United States Supreme Court in all cases where the decision of the state court was against an asserted national power or right, or in favor of state authority alleged to be in violation of national power or national right. This act, with the amendments to it before 1914, proceeded upon the assumption that the state courts would decide in favor of state authority in case of conflict; and therefore made the state courts the final interpreters, within their own borders, of the constitution of the United States, as long as they decided in favor of national authority. If a state court desired to construe the constitution of the United States more strictly against state power than did the United States Supreme Court, its decision was final, for no plan existed by which that issue might get to the highest federal tribunal.

United States Supreme Court finally construes national constitution

Under this arrangement the United States Supreme Court fixed the outer limits of state power; but each state court within its own territory could set narrower limits. The constitution of the United States was theoretically subject to final construction by the United States Supreme Court; but variations in its construction might exist in each of the forty-eight states. Thus the highest court of one state might, without the possibility of reversal, have held an eight-hour law for women violative of the constitution of the United States, even though the United States Supreme Court had held similar legislation proper and valid. A view in favor of state power as against an assertion of national power or right was reviewable by the United States Supreme Court; and if the state courts were liberal in their construction of state powers, their decisions might be reversed by the highest federal court. No court likes to be reversed. Not only

this, but the growth of a more complete national consciousness had its influence in causing state judges to decide against state powers. The highest state courts thus became in some respects more zealous guardians of national authority and national rights than the United States Supreme Court itself. In order to meet this situation, an amendment to the federal judicial code was adopted in 1914,[1] which authorizes the United States Supreme Court to require a case to be certified to it for final decision from the highest state court, even though the decision of the highest state court is in favor of the federal right or authority. In this manner the United States Supreme Court has the power in all cases to determine finally the meaning of the constitution of the United States for the whole territory of the nation.

State courts construe state constitutions

The highest state court is for its territory the final body to construe the constitution of that state, and to determine whether the laws of that state are in conflict with that constitution.[2] The methods of appeal from inferior state courts to the highest state court vary; but these variations are not material here.

Identical constitutional provisions

One of the most serious problems concerning judicial control over legislation arises from the fact that state constitutions contain certain limitations upon state power which are identical with limitations imposed upon state power by the national constitution. For example, every state constitution has a provision, equivalent to the provision of the Fourteenth amendment, that no state shall "deprive any person of life, liberty, or property without due process of law"; and most of the states have provisions against bills of attainder, *ex post facto* laws, and laws impairing the obligation of contracts. The limitations of the constitution of the United States against state powers are finally construed by the Supreme Court

[1] Federal Judicial Code, Section 237, further amended in 1916.

[2] The United States Supreme Court may, of course, determine finally whether a state constitutional provision violates the constitution of the United States.

CHAP. VI

of the United States. The limitations against state powers in state constitutions are finally construed for each state by the highest court of that state. It is therefore possible for the highest court of a state to say that the provision regarding due process of law in the state constitution is more restrictive of state legislation than is the similar provision in the United States constitution as construed by the United States Supreme Court. Not only this, but the language of one state constitution may be, and is, construed differently from the same language in another state constitution. The enforcement of broad state constitutional guaranties rests finally in the hands of the state courts of each state. There is no real necessity for duplicate sets of constitutional guaranties, such as we have with respect to due process of law. Clearly, the limitation of the Fourteenth amendment upon the states is sufficient in this respect, if the United States Supreme Court can be relied upon to protect individual rights adequately; and no one denies that this court can be so relied upon. However, these duplicate guaranties do exist in the state constitutions, and have in many cases been so applied as to cripple materially the proper exercise of legislative authority.

Due process of law

Broad constitutional guaranties, such as that with reference to due process of law, lie entirely within the discretion of the court. When new legislation presents itself, the court is in a position to say that such legislation is constitutional or unconstitutional, according to the views of the members who compose it at the particular time. Due process of law and certain other types of constitutional limitations have been so construed by American courts that they restrict the whole field of legislative power. If a particular state court is illiberal and desires to prevent a certain type of legislation, it may do so, although the same type of legislation may have been upheld as not in conflict with identical provision of other state constitutions and of the consti-

tution of the United States. Such a decision of a state supreme court may, of course, be overcome by amending the state constitution.

Social legislation

A new type of legislation is very likely to be held unconstitutional by some of the state courts. When workmen's compensation legislation was new in this country, a compulsory workmen's compensation law was held unconstitutional by the court of appeals of New York in the important case of Ives *v.* South Buffalo Railway Co.[1] The New York constitution was then amended so as expressly to authorize compensation legislation, and legislation was sustained by the New York court of appeals. However, the decision of the New York court is responsible for the introduction of provisions into a large number of state constitutions expressly authorizing workmen's compensation laws. The states that so amended their constitutions desired to pass workmen's compensation laws and feared that their courts would follow the New York decision. If an issue came up to-day as to compulsory workmen's compensation laws, no constitutional objection would be raised against such legislation; because the courts have become familiar with it, and public sentiment regards such legislation as necessary.

Constitutional changes to avoid effect of decisions

State constitutions to-day contain a vast mass of social legislation, or of express authorizations for social legislation. Many of these provisions have been placed in these constitutions as a direct result of judicial decisions. Of the constitutional amendments adopted by the people of Ohio in 1912, the following four, among others, relate to social and industrial legislation: (1) authorizing legislation with respect to mechanics' liens; (2) authorizing legislation fixing and regulating the hours of labor, establishing a minimum wage, and providing for the comfort, health, safety, and general welfare of employees; (3) permitting compulsory work-

[1] 201 N. Y. 271 (1911).

CHAP. VI

men's compensation; and (4) prescribing an eight-hour day on public works. Two of these amendments were prompted by judicial decisions holding that legislation was forbidden by broad state constitutional language equivalent to the due process clause in other constitutions. The authorizations in the other amendments were inserted as a matter of caution, to prevent judicial annulment. Two of these amendments expressly provide that "no other provision of the constitution shall impair or limit" the powers so granted.

Grants of legislative power

A large and important series of provisions now found in state constitutions has been inserted into these constitutions, not for the purpose of limiting state legislative power, but for the direct and express purpose of relieving state legislative power from broad constitutional restrictions as construed by the courts. However, when these provisions are once put into state constitutions, they come to be construed as limitations, just as in the Nebraska case with respect to reformatory institutions. When it is desired that the legislature shall have certain powers, and that these powers shall not be interfered with by broad constitutional provisions, the power is likely to be put into the constitutional text, with a detailed indication of the manner in which the framers of the constitutional change desire the power to be exercised. The courts then construe this language as limiting the legislative department to the specific type or thing expressed in the constitution. When some change of policy with respect to the matter is desired, a new constitutional amendment becomes necessary. For example, Ohio by constitutional amendment in 1912 expressly authorizes workmen's compensation "through a state fund created by compulsory contribution thereto by employers." If Ohio desired to adopt a different type of workmen's compensation law, another constitutional change would be necessary. Thus, detail breeds detail; and a good deal of the detail now found in state constitutions has been

made necessary by an illiberal and unnecessary construction of state constitutional provisions, when perhaps no difficulty presents itself in the construction of similar provisions by the United States Supreme Court. A large part of this difficulty could be avoided by omitting from state constitutions such broad guaranties as merely duplicate those imposed upon the states by the constitution of the United States.

Movement to restrict judicial power

The process of constitutional change has in many cases been employed as a means of overcoming the effect of state judicial decisions. The judicial construction of a constitutional provision becomes a part of that provision; and if the people desire to change their constitutional policy by amendment, it is entirely proper that they should do so. However, the constitutions of a number of states are difficult to change. The unnecessary difficulties thrown in the way of new social legislation by the courts of some states led some years ago to a strong movement to restrict or limit judicial action. This movement obtained its greatest strength through the organization of the Progressive party in 1912, and led to several important changes in state constitutions.

Concurrence of more than majority of judges

A constitutional amendment in Ohio in 1912 provides that "no law should be held unconstitutional without the concurrence of all but one of the judges, except in the affirmance of the judgment of intermediate courts of appeal declaring laws unconstitutional."[1] A North Dakota amendment of 1918 provides that "in no case shall any legislative enactment or law of the state of North Dakota be declared unconstitutional unless at least four of the judges shall so decide." With a court of five judges, this substantially means the same as the

[1] It is not an uncommon rule to require that issues of constitutionality be passed upon by a majority of the full court. This rule is provided for expressly by the constitution of Virginia, which requires the concurrence of at least three of the five judges in order to declare a law unconstitutional. See R. E. Cushman, "Constitutional Decisions by a Bare Majority of the Court," *Michigan Law Review*, XIX, 771-803 (1921).

CHAP. VI

Ohio provision. Nebraska by amendment of 1920 requires the concurrence of five judges. The court is composed of seven members.

Recall of decisions

In 1912 ex-President Roosevelt advocated the so-called recall of judicial decisions; and in that year a provision of this character was inserted into the constitution of Colorado. Under the Colorado provision, no court except the supreme court was to declare unconstitutional a law, or a charter provision adopted by a city. The decision that a law was unconstitutional was not to become effective for sixty days. "Within said sixty days a referendum petition signed by not less than 5 per cent. of the qualified voters . . . may request that such law be submitted to the people of this state for adoption or rejection. . . . All such laws or parts thereof submitted as herein provided when approved by a majority of votes cast thereon at such election shall be and become the law of this state, notwithstanding the decision of the supreme court." This provision was crudely drawn and has been held unconstitutional by the state supreme court,[1] on the ground that it violated the federal constitution as an effort to restrict the court's power to decide federal questions.

Recall of judges

The movement for the recall of judges was another phase of the organized opposition to judicial control over legislation. Beginning with a constitutional amendment in Oregon in 1908, eleven states have adopted constitutional provisions for the recall of officers. Seven states permit the application of the recall to judges.

Frequency with which courts declare laws invalid

On the whole, little has been accomplished by the movement to place special safeguards around declarations of unconstitutionality. For a while the courts were illiberal, and the movement itself had something to do with liberalizing the attitude of the courts. But the specific constitutional changes introduced have had little or no real effect with respect to judicial action. The

[1] People *v.* Western Union Telegraph Co., 198 Pac. 146 (1921).

state courts pass every year upon a large number of constitutional issues, and hold invalid a large number of acts or parts of acts enacted by legislative authority. The increasing detail and the increased number of limitations in state constitutions are partly responsible for the increase in the number of state laws declared unconstitutional; but this increase is also to a large extent due to an increased tendency upon the part of courts to find constitutional objections to statutes. In Illinois the supreme court during the period from 1870 to 1913 passed upon 789 cases involving the constitutionality of statutes, and in more than a fourth of these cases statutes were declared invalid. To a great extent these cases were based upon limitations that first appeared in the Illinois constitution of 1870 or upon limitations whose stringency was then increased. The number of cases involving constitutional issues between 1890 and 1913 outnumbered those between 1818 and 1889. It is now customary to raise the question of constitutionality as a matter of course in cases that involve new enactments. In view of the fact that statutes are declared invalid at substantially every term of each state supreme court, a declaration of unconstitutionality has naturally lost the extraordinary and solemn characteristics that it may once have possessed. A function necessarily ceases to be solemn and extraordinary when it is exercised with great frequency. The steadily increasing bulk of cases involving constitutional questions may in great part be explained by (1) the growth of specific limitations upon legislative bodies; (2) the extended use of the due process of law limitations and similar broad limitations; and (3) to the increased persistence with which constitutional objections to statutes have been urged upon the courts of this country. The extent to which a court exercises a particular authority depends to a large extent upon the persistence of counsel in the argument of cases. The increased persistence with which constitutional objections are urged

CHAP. VI

bears a direct relation to the increase in state legislation regulating social and industrial relations. Those adversely affected by such legislation in recent years have naturally sought to obtain judicial decisions adverse to almost every new enactment.

Decision as incident to a case

In view of the increased frequency with which courts pass upon the validity of statutes, it is natural that they should have weakened the early doctrine that the question of constitutionality should be decided only as an incident to the determination of a bona fide controversy between parties. For a number of years, questions of constitutionality have been largely decided in cases where a person adversely affected by a statute seeks an injunction to prevent its enforcement, or where a person beneficially affected seeks a mandamus to compel action under the statute. The issue of constitutionality in most cases of this kind is the sole issue presented for the court's determination, and the case is made for the determination of that issue. This is well recognized by counsel in almost all of the cases involving the validity of important statutes. Instead of being an incident, the issue as to the validity of the statute is the whole case.

Types of constitutional provisions

In connection with the problem of judicial control over legislation in the American states, it may be well to analyze the character of the issues presented to the courts. The courts have usually stated the issue of the judicial power to pass upon the validity of legislation as one involving merely the comparison of two written documents, the one superior and the other inferior, in order to determine whether a conflict exists. Their earlier doctrine was that such a conflict must clearly exist in order for the court to hold a statute invalid. If the issue were as clear as this, little difficulty would present itself. Constitutions in the main use broad language, and that language obtains its meaning through judicial construction. Some constitutional provisions are much more definite than others and give little oppor-

tunity for judicial construction. Others are broader and leave great freedom in this respect. No really satisfactory classification of constitutional provisions can be made, but with regard to the freedom of judicial interpretation they may be roughly grouped into four classes:

Narrow and definite provisions

(1) Narrow and definite constitutional provisions presenting an objective standard capable of application by a court without any great discretion as to the interpretation or the extent of the limitation. A good many limitations relating to the form of legislative action, or to specific prohibitions upon certain types of legislation, fall within this class. Constitutional provisions specifying the form of an enacting clause for legislation or the form of judicial process are of this class. The constitution prescribes certain language, and it is perfectly easy to determine whether that language has been used. However, the courts have rather generally taken the view that the precise form of language is merely directory, and that substantially the required language is sufficient. Therefore the definite character of the text of the constitution disappears by interpretation. Sometimes a definite mathematical standard is set, as in the senatorial apportionment provision of the constitution of Illinois, where an apportionment ratio is provided and the constitution says that "no district shall contain less than four fifths of the senatorial ratio."

Broad and definite provisions

(2) Limitations, broad in character, but still definite, and presenting something of an objective standard by which to test the validity of legislation. In this class come the provisions of the United States and state constitutions against the passage of laws impairing the obligation of contracts. Here terms are used that have a fairly definite meaning in a legal system, and the limitation of the constitution states a legal principle, although there is still a wide range of discretion in the interpretation and application of that principle. Provisions of this character, although involving elements of

CHAP. VI

indefiniteness, tend to attain more definite meaning through judicial construction.

Narrow and indefinite provisions

(3) Limitations, narrow in character, but so indefinite that they do not present an objective standard by which the validity of legislation may be tested. Of this type is the provision in many constitutions that no bill "shall contain more than one subject, which shall be expressed [or clearly expressed] in its title." Flagrant violations of this requirement may of course be apparent, but no test as to when the rule is violated is laid down by the provision itself, and none has been developed by judicial action. Each case must be determined upon its own facts, which may vary from those of every other case. In a provision of this sort continued uncertainty is to some extent inherent in the limitation itself.

Broad and indefinite provisions

(4) To a fourth class may be assigned restrictions, both broad in scope and indefinite in character, neither limiting themselves to the control of definite types of legislative action nor presenting an objective standard by which to test the validity of legislation. They are indefinite provisions limiting the whole range of legislative power. Here belongs the provision that "no person shall be deprived of life, liberty, or property without due process of law," as it has been generally applied since 1885. As now construed this provision means little less than that the courts will uphold legislation if, in view of all the conditions, they regard it as reasonably appropriate to meet the conditions that the legislature seeks to control.

Results of judicial construction

Constitutional provisions have been the subject of judicial construction in the United States for nearly one hundred and fifty years. Some have acquired by this process a more definite meaning. But new provisions have been constantly added, and judicial application, even though often repeated, has not by any means always resulted in marking sharply the limits of constitutional requirements. Some of the requirements are

themselves incapable of clear definition; others, as for example due process of law, the courts have preferred not to define. A refusal to define broad limitations has obtained a desirable flexibility in our constitutional system and has permitted the courts the more readily to change in order to meet new conditions. Constitutional progress in the American states may to a large extent be traced in the distinguishing, limiting, or reversal of previous decisions. For example, the supreme court of Illinois in 1895 declared it improper to regulate the labor or hours of women differently from that of men, and in 1911 reached precisely the opposite result, without any change whatever in the state constitution. This is but an illustration of what state courts have done over and over again in order to readjust their views to the changing needs of the community. Had a definite and precise meaning been given to "due process of law," such changes of judicial attitude would be more difficult.

Broadening of limitations

The general tendency of state judicial construction has been to expand and broaden state constitutional limitations, rather than to narrow them and make them more definite. This certainly has been true of some of the more important limitations, such as "due process of law." In general this was a development that was to have been expected. People who were seeking to protect rights have urged the widest interpretation of the clauses upon which such protection may be based. Arguments for wide interpretation are presented constantly and persistently by counsel, and in some of the cases in which the arguments are presented need seems to exist for wider protection than that previously afforded. Opposition will not be so persistent, and an affirmative plan always has an advantage over a mere negative opposition. Before 1845 contest of the validity of legislation was still an unusual thing, and during the ten years following that date a number of courts expressed their disapproval of the effort to test the constitutionality of almost every

piece of new legislation. But the inevitable result was that the courts soon adjusted themselves without difficulty to the task of passing upon issues so presented.

Does construction make constitutions more definite?

Judicial construction is an essential element in the American system of written constitutions, under which the courts have power to declare laws unconstitutional. The theory that state constitutional law is merely a body of enacted law found in written documents is not true to fact. The state constitution is primarily a set of limitations, but it is for the court to determine what is the extent of these limitations.[1] Upon the basis of the grouping just suggested, to what extent are constitutional provisions transferred by judicial construction from the indefinite to the definite classes? To what extent does judicial construction reduce the sum total of indefiniteness in the document construed? To put the issue somewhat differently, to what extent does the court reduce the amount of its own discretion in the future application of the document? Upon the answer to these questions depends, to a large extent, not merely a judgment as to the success of judicial construction, but also the determination as to the extent to which such constructions will help intelligent legislators to avoid constitutional difficulties in the future. With respect to the judicial construction of the constitution of Illinois during the fifty-year period from 1870 to 1920, it may be said that a number of constitutional provisions have become more definite, but that this increased definiteness in some provisions has been more than offset by the indefinite character imposed by judicial action upon a small number of more important constitutional provisions. The task of legislation in Illinois, assuming intelligence and care in the legislative body, was in 1921 more hazardous than in 1871. This is a situation that can be remedied only by the courts themselves.

[1] For fuller discussion see W. F. Dodd, "The Problem of State Constitutional Construction," *Columbia Law Review*, XX, 635-651 (1920).

Courts as a conservative influence

The courts are a conservative influence. The lines separating private right and public interest are constantly shifting, and it may be that the judicial function of protecting individual rights can best be performed through broad guaranties that are undefined and substantially undefinable, but which receive their application to new situations in each issue as it presents itself. There is thus a broad judicial discretion in the interpretation of indefinite constitutional limitations. As a matter of fact, it is in this field that the problem of judicial construction principally presents itself; although the failure of the courts to perform adequately their task of construction with respect to more definite provisions has given no effective aid to the legislative bodies and to the people as to the meaning of constitutional provisions which ought through judicial construction to receive a definite meaning. So far as broad constitutional guaranties are concerned, the courts tend to a great extent to adjust themselves to new conditions. During the period from 1905 to 1915 a great change took place in the attitude of state courts, and they began to uphold legislation which a few years before they would probably have declared unconstitutional. This liberal attitude is not so apparent to-day, but the movement has not spent its force by any means. When a state court or when the United States Supreme Court misinterprets the community need in holding a statute unconstitutional, the effect of such a decision is apt in time to be overcome by the court itself, either by a gradual shifting of attitude or, less frequently, by an express reversal of position.[1]

Judicial action finally agrees with popular will

In changing their attitude courts do not move in a straight line, and their later views may not be logically consistent with their earlier ones. But logic is not the

[1] In the regulation of hours of adult male labor, compare Bunting *v.* Oregon, 243 U. S. 426 (1917) with Lochner *v.* New York, 198 U. S. 46 (1905). In People *v.* Williams, 189 N. Y. 131 (1907) the New York Court of Appeals held invalid a law forbidding night labor by women. In People *v.* Schweinler Press, 214 N. Y. 395 (1915) it held such legislation valid. The court's attitude had completely changed within eight years.

CHAP. VI

most important factor in controlling political and legal development. A change of attitude upon the part of a court ordinarily takes some time, and it is often necessary to overcome more promptly the effect of a decision based upon broad constitutional guaranties. The more prompt method of overcoming state judicial decisions construing the state constitution is that of constitutional amendment. The popular will must finally control in any popular government, either through the education of the courts or through an express change in constitutional texts. The constitution of the United States is, of course, difficult to change, although even that document has been altered several times for the express purpose of establishing a policy different from that announced through judicial construction.[1]

Constitutional amendments

Many state constitutions are difficult to change, and in states where this is the case, the only method of obtaining the final success of the popular will is a change in the attitude of the court. This is not sufficient. It is wise to have a judicial control to prevent a violation of constitutional provisions. In order to have such an institution, it is probably wise to have broad guaranties, judicially enforceable for the protection of individual rights. But no state government should be so organized that a judicial determination may, for any great period of time, prevent the adoption of a policy that is desired by the permanent sentiment of the people. The court as a conservative influence may be employed to force popular reconsideration of a new issue that presents itself. But such a reconsideration must be possible, if popular government is to prevail. It has already been pointed out that when the New York court of appeals declared a compulsory workmen's compensation law invalid, a state constitutional amendment was adopted expressly authorizing such legislation. When the Colorado supreme court held an eight-hour day for mines and

[1] Particularly by the Eleventh and Sixteenth amendments.

smelters invalid as a violation of due process of law, the state constitution was so changed as expressly to provide such a rule. There have been numerous cases in state constitutional history of this character; and if the constitution may be amended without great difficulty the possibility of amendment presents a sufficient check upon judicial supremacy. Clearly, the courts ought to return to their earlier view that the passing upon the validity of statutes is a serious matter; and something may be accomplished by throwing additional safeguards around the judicial action upon such questions. But if state constitutions are to remain elaborate and complex instruments, the mass of judicial construction will increase rather than decrease. This situation presents no serious hindrance to popular government if changes may be made whenever constitutional provisions have ceased to be useful, or whenever the courts through the construction of constitutional provisions have set up obstacles to the adoption of any policy that the permanent sentiment of the community demands.

CHAPTER VII

ORGANIZATION OF THE STATE LEGISLATURE

THE LEGISLATURE OF TWO HOUSES

History of system

IN all of the American states, legislative power is exercised by a body composed of two chambers. With the exception of Pennsylvania (1776-1790), Georgia (1777-1789), and Vermont (1777-1836), the bicameral system has prevailed since the adoption of the first state constitutions. In the colonies the legislature generally consisted of two houses, the one composed of members chosen by the voters, and therefore representing the popular element in the colony; and the other composed of members appointed by and representing the British crown, though in at least three of the colonies this difference of representation in the two houses did not exist.

Proposal for one house

It was natural that the framers of the first state constitutions should continue the organization of their legislatures in two houses. The organization of the national legislature in two houses in 1787 has helped to maintain the two-chambered legislative organization in the states; although in the state legislatures there has not been the definite reason for organization in two houses which exists in the federal system. There has been a good deal of discussion in recent years of the proposal to adopt a single-chambered legislature. It is argued that there is little actual difference in the basis of representation in the two houses, and that legislative bodies composed of two chambers are cumbersome and ineffective. Constitutional amendment for the organization of legislative bodies composed of but one house were proposed in Ore-

gon in 1912 and 1914, in Oklahoma in 1914, and in Arizona in 1916. All of these proposed amendments failed.

Kansas proposal

Governor Hodges of Kansas, in a message to the legislature of that state in 1913, urged the adoption of a single house, and said: "Two years ago I suggested a single legislative assembly of thirty members from thirty legislative districts. I am now inclined to believe that this number is too large, and that a legislative assembly of one, or at most two, from each congressional district would be amply large. My judgment is that the governor should be *ex officio* a member and presiding officer of this assembly, and that it should be permitted to meet at such frequent and regular or adjourned sessions as the exigencies of the public business may demand; that their terms of office be for four or six years, and that they be paid salaries sufficient to justify them in devoting their entire time to the public business." Governor Hodges' proposal was, of course, an extreme one, for he had in mind not merely the adoption of a single-chambered legislature, but also that this legislature should consist of a small group of more or less permanent expert legislators. The proposals in Oregon, Arizona, and Oklahoma did not go so far, and no plan such as that suggested by Governor Hodges has been submitted to the voters in any state. The plan submitted in Oregon in 1912 contemplated a single-chambered legislature, of which the governor should be a member, and of which the minority candidates for the governorship should also be members, with voting power proportionate to the votes they received as candidates. The Oregon plan contemplated that the single legislative body should consist of sixty elective members with terms of four years, and that the actions of this body should be subject to the initiative and referendum.

Difference in composition

In advocacy of a single-chambered legislature it has been argued that the real differences between the two

CHAP. VII

houses of state legislatures have disappeared. In the early constitutional history of the American state, distinctions were in a number of cases made between the two houses, through higher property qualifications not only for the members, but also for those who voted for members, of the smaller of the two bodies. The Massachusetts constitution of 1780 provided that in apportioning senators the general court of that state should "govern themselves by the proportion of the public taxes paid by the said districts." The same plan was adopted for its senate by the New Hampshire constitution of 1784, and still exists in that state. However, the chief differences between the two houses in the American states at the present time are that one house has a smaller number of members than the other, and that in a majority of states senators are elected for four years and representatives for two years. In some states, one half of the members of the Senate are elected every two years, so that the Senate has continuous membership, as contrasted with the House, whose membership changes as a whole at each election. In Alabama, Louisiana, and Mississippi, however, four-year terms have been provided for members of both houses; and a number of states have a two-year term for members of both houses. In these states the difference between the two houses is substantially immaterial.

Differences in power

To some extent, however, differences in the powers of the two houses still exist. In some states, constitutional provisions remain by which financial measures must originate in the lower house; and in most of the states the Senate has certain powers with respect to confirmation of executive appointments. The provisions for impeachment of public officers also ordinarily prescribe that charges shall be brought by the lower house and tried by the Senate. Some of the matters constituting differences in the powers of the two houses do not relate to their purely legislative functions; and on

the whole it may be said that, from the standpoint of legislation, the two houses of the American state legislature have equal powers and in no way represent different points of view in the community. Distinct differences that existed in many states in earlier times have substantially ceased to exist.

Argument against bicameral system

It is properly said that the present state legislative organization is cumbersome, and that such a type of organization is not necessary for a legislature with powers that are distinctly subordinate to the powers of the national government. Often members of one house of a state legislature coöperate with the members of the other for the purpose of defeating legislation in such a manner that the responsibility for action can not be fixed. The bicameral system makes it more difficult to place the responsibility for action or inaction in the field of legislation than if the legislature were organized as a single chamber.

One house as a check on the other

It has also been urged that bills passed by one house of a state legislature are in most cases passed by the other house as a matter of course, and without amendments; and there seems some basis for this argument, at least in New York and some other states.[1] However, this statement does not apply to all of the state legislatures. An examination of the legislative work of the Illinois General Assembly, covering the sessions of 1907, 1909, 1911, and 1913, indicates that each house exercised a fairly decisive influence in that it defeated about one out of five of the bills passed by the other house. The influence of each house, in preventing the adoption of bills passed by the other house, results in this state in the actual defeat of more legislation than does the governor's veto, although the veto power has been actively exercised in Illinois during recent years.

[1] D. L. Colvin, *Bicameral Principle in the New York Legislature* (New York, 1913); Lynn Haines, *The Minnesota Legislature of 1911* (Minneapolis, 1911); Franklin Hichborn, *Story of the Session of the California Legislature of 1913* (San Francisco, 1913).

CHAP. VII

Influences that cannot be measured

It is true also of many state legislatures that a large proportion of the bills passed by one house fail because of inaction of the other house rather than because of an actually negative vote. It is also true that bills passed by one house are in a great number of cases amended before passage by the other house, and finally become law either as so amended or with amendments that resulted from action taken by the second house. It is substantially impossible to work out a statistical table illustrating the influence of one house upon the actual form of bills passed by the other, but this influence must be taken into consideration in weighing the advantage of state legislative organization in two houses. The organization of legislative bodies in two houses does, however, permit the shifting of responsibility, and it is clear that in many state legislatures the members of both houses will frequently obtain a record upon the journals of favoring a particular type of legislation, although the majorities of both houses were at all times certain that no such legislation would be enacted.

Single chambers in other governments

In favor of a single-chambered legislature, it is argued that such a proposal is not a radical one, and that the unicameral system has been adopted in most of the states that go to make up other federal governments. In the United States all of the states have two-chambered legislatures. In the Australian Commonwealth, five states have the bicameral system. Queensland abolished its upper house in 1922. In Argentina the majority of the provinces, which correspond to our states, have the two-chambered system, but some have legislative bodies of only one house; and in most of the individual states of the other Latin-American federations the unicameral plan prevails. In Germany, before the war, fifteen of the twenty-five states had single-chambered legislatures. All of the cantons of Switzerland, which operate under the representative system, have single-chambered bodies. In the Dominion of Canada, only two of the nine

provinces have two-chambered legislatures. Since the Civil War, there has been a decided tendency in all the larger cities of this country away from the city council composed of two houses; and the city council composed of only one house has worked more satisfactorily than the older plan.[1]

Present differences in representation

Where the two chambers of the state legislature represent different interests in the community, this fact of course constitutes an argument for this type of legislative organization. In some states to-day one chamber represents a rather distinct interest as against the other. It is sufficient here to point out that in some states there is a gross inequality of legislative representation in one or both of the state legislative bodies. Where one house of the legislature is composed of members apportioned in fair relation to the population of the state, and the other house is composed of members elected from local areas in such a manner as to represent a distinct minority of the population, there exists an actual difference in the basis of the organization of the two houses; and this difference, although to a very great extent unjustifiable, does, so long as it exists, constitute perhaps something in the way of a reason for the maintenance of two houses.

Desirability of single chamber

Our cumbersome legislative system now has two many checks. The organization of the state legislature as a unicameral body would not reduce the desirable checks upon state legislative action. The control through the governor's veto power would continue, as would also the whole series of constitutional limitations enforceable by judicial action. The problem of the two-chambered legislature has been actively discussed in Great Britain and in other countries having the parliamentary system. Under this system the government is managed by a group

[1] For a review of the movement for single-chambered legislatures in this country and elsewhere, see James D. Barnett, "The Bicameral System in State Legislation," *American Political Science Review*, IX, 449-466 (1915).

CHAP. VII

of leaders who are responsible to a popularly elected legislative body and who resign when they lose the support of that body. Under this system many difficulties present themselves if a governing group or cabinet is responsible to two legislative bodies, which may at a particular time be controlled by different interests in the community. For this reason the tendency in countries having a parliamentary system has been toward making the cabinet, as a governing group, responsible to the more popular of the two legislative bodies. This means, of course, that the other house has little influence upon measures of a political character.[1]

American state experience with single legislative body

The experience with unicameral legislative bodies in American states came at an early period in our governmental experience, and has little value in its bearing upon the present proposal to adopt single-chambered legislatures. Pennsylvania, during the period when it had a single-chambered legislature, went through many stormy political experiences, but the existence of the single state legislative body can not be held responsible for these experiences. The experience of Georgia over a still shorter period, and of Vermont over a period of substantially sixty years, throws little light upon the problem. It would be highly desirable, however, for some student of legislative history in Vermont to make a thorough study of the experience of that state in this matter.

Names of legislative bodies

The student of political institutions would be aided if the several states called the same institutions by the same names. The smaller house of the legislature is in all of the states called the Senate. All but eight of the

[1] Upon the whole subject of single-chambered legislatures, see H. W. V. Temperley, *Senates and Upper Chambers* (London, 1910). See also Bulletin No. 1 of the Legislative Reference Department of the Kansas State Library, *Legislative Systems* (Topeka, 1914); University of Oklahoma Bulletin, New Series No. 77, *Bicameral Legislatures* (1913); Nebraska Legislative Reference Bureau, Bulletin No. 3, *Legislative Procedure in the Forty-eight States* (Lincoln, 1914); and Oregon Publicity Pamphlet for 1912.

states call their larger house a House of Representatives; but the eight have such titles as Assembly, General Assembly, and House of Delegates. Nearly half of the states use the term Legislature to designate the two houses together; but twenty use the term General Assembly; and three use the term Legislative Assembly. Massachusetts still uses the term General Court, which was first employed in the colonial charter, and New Hampshire uses the same term. New Jersey calls its larger house a General Assembly, whereas twenty other states call the two houses together by the same name. In view of the fact that the legislative bodies have somewhat varying names in the several states, it has been customary to refer to the larger of the two houses as the lower house, and to the smaller as the upper house. This language will occasionally be employed throughout this discussion. The terms "upper house" and "lower house" have largely come into our political language through the similar use of language with respect to the two houses of the British Parliament. The small legislative body, composed in most cases of appointive members in the American colonies, was termed the upper house, and this language has persisted in American usage, although no basis in fact exists for calling one house the upper house and the other the lower house.

SIZE OF LEGISLATIVE BODIES AND APPORTIONMENT OF MEMBERS [1]

Size of legislative bodies

Some state constitutions prescribe the maximum number of members of each house, leaving to the legislature the determination of the exact number within the maximum limit.[2] Others prescribe a maximum and a minimum number of members of each house, leaving to the

[1] Upon this subject see Bulletins of the Massachusetts Constitutional Convention, 1917-18, II, 339.

[2] Alabama, Florida, Indiana, Kansas, Louisiana, Nebraska, Oklahoma, Oregon, Utah.

MEMBERSHIP, TERM OF LEGISLATURE, TERM OF GOVERNOR, FREQUENCY OF SESSIONS, AND LIMIT OF SESSIONS

STATE	MEMBERSHIP IN SENATE	MEMBERSHIP IN HOUSE	TERM OF MEMBERS OF SENATE	TERM OF MEMBERS OF HOUSE	TERM OF GOVERNOR	SESSIONS HELD	LIMIT OF SESSION
Alabama	35	106	4	4	4	Quadrennial	50 days
Arizona	19	35	2	2	2	Biennial	60 days
Arkansas	34	99	4	2	2	Biennial	60 days
California ...	40	80	4	2	4	Biennial	None [1]
Colorado	35	65	4	2	2	Biennial	90 days
Connecticut ..	35	262	2	2	2	Biennial	5 months
Delaware	17	35	4	2	4	Biennial	60 days
Florida	32	77	4	2	4	Biennial	60 days [2]
Georgia	44	193	2	2	2	Annual	50 days [2]
Idaho	43	65	2	2	2	Biennial	60 days
Illinois	51	153	4	2	4	Biennial	None
Indiana	50	100	4	2	4	Biennial	61 days
Iowa	50	108	4	2	2	Biennial	None
Kansas	40	125	4	2	2	Biennial	50 days
Kentucky	38	100	4	2	4	Biennial [3]	60 days
Louisiana	39	100	4	4	4	Biennial [3]	60 days [2]
Maine	31	151	2	2	2	Biennial	None
Maryland	27	107	4	2	4	Biennial [3]	90 days
Massachusetts.	40	240	2	2	2	Annual	None
Michigan	32	100	2	2	2	Biennial	None
Minnesota ...	67	130	4	2	2	Biennial	90 days
Mississippi ...	45	133	4	4	4	Biennial [3]	None
Missouri	34	150	4	2	4	Biennial	70 days
Montana	54	100	4	2	4	Biennial	60 days
Nebraska	33	100	2	2	2	Biennial	None
Nevada	22	53	4	2	4	Biennial	60 days
New Hampshire	24	418	2	2	2	Biennial	None
New Jersey ..	21	60	3	1	3	Annual	None
New Mexico ..	24	49	4	2	2	Biennial	60 days
New York ...	51	150	2	1	2	Annual	None
North Carolina	50	119	2	2	4	Biennial	60 days
North Dakota .	49	113	4	2	2	Biennial	60 days
Ohio	37	125	2	2	2	Biennial	None
Oklahoma ...	44	107	4	2	4	Biennial	60 days
Oregon	30	60	4	2	4	Biennial	40 days
Pennsylvania .	50	208	4	2	4	Biennial	None
Rhode Island .	39	100	2	2	2	Annual	60 days
South Carolina	44	124	4	2	2	Annual	40 days

MEMBERSHIP, TERM OF LEGISLATURE, TERM OF GOVERNOR, FREQUENCY OF SESSIONS, AND LIMIT OF SESSIONS — *Continued*

STATE	MEMBERSHIP IN SENATE	MEMBERSHIP IN HOUSE	TERM OF MEMBERS OF SENATE	TERM OF MEMBERS OF HOUSE	TERM OF GOVERNOR	SESSIONS HELD	LIMIT OF SESSION
South Dakota .	45	103	2	2	2	Biennial	60 days
Tennessee	33	99	2	2	2	Biennial	75 days
Texas	31	142	4	2	2	Biennial	60 days
Utah	20	55	4	2	4	Biennial	60 days
Vermont	30	247	2	2	2	Biennial [3]	None
Virginia	40	100	4	2	4	Biennial [3]	60 days
Washington ..	42	97	4	2	4	Biennial	60 days
West Virginia	30	86	4	2	4	Biennial	60 days [4]
Wisconsin ...	33	100	4	2	2	Biennial	None
Wyoming ...	25	60	4	2	4	Biennial	40 days

[1] Split session—first part thirty days, recess thirty days, second part no limit.

[2] The Florida legislature meets on the first Tuesday after the first Monday in April; the Louisiana legislature on the second Monday in May; and the Georgia legislature the first Wednesday after the first Monday in June; all other legislative sessions begin in January.

[3] Meets in even years; all others in odd years.

[4] Split session—first part fifteen days, recess for more than thirty days, then forty-five days.

legislature the power to fix the membership within these terms.[1] In some constitutions a maximum or a minimum number, or both, is prescribed for one house, and a precise number is fixed for the other.[2] Some states fix specifically or by implication the exact number of senators and representatives which shall compose the two houses.[3] In a few states the exact number of members in one house is fixed, leaving the legislature to determine the number in the other on the basis of population,[4] either

[1] Mississippi, North Dakota, South Dakota, Virginia.

[2] Iowa, Georgia, Michigan, Maine.

[3] New York, California, Delaware, Illinois, Massachusetts, Kentucky New Mexico, North Carolina.

[4] Texas and Missouri.

CHAP. VII

with or without limitation. In others a fixed number may be changed by legislative action.[1] Some states prescribe that a certain proportion shall exist between the sizes of the two houses.[2] The constitutions of Colorado and Nevada provide that the aggregate number of members in the two houses shall not exceed a specified number.

Variations in size

To a large extent the exact number of members of the two houses, or of one of the two houses, is left to legislative determination, subject to constitutional restrictions. A table on page 164 sets out in detail the membership of state legislative bodies. The size of the two houses varies a good deal from one state to another. The Minnesota senate is the largest, with sixty-seven members, and that of Delaware the smallest, with seventeen. The size of the lower houses ranges from thirty-five in Arizona and Delaware to four hundred and eighteen in New Hampshire. The membership of the lower houses is especially large in several of the New England states because of the system of town representation, but in these states the senate is relatively small. A proposed constitutional amendment was submitted to the people of Ohio in 1913 which would have reduced the house of representatives from 123 members to 50, and the senate from 33 to 22. This proposal was defeated. Not only are there variations in the size of legislative bodies from state to state, but these bodies vary in the same state. In many states the plan of periodical reapportionments involves a change in the number of members each ten years. Plans of representation adopted in a few states involve variations from session to session. Under the plans of Ohio and Oklahoma, counties may be represented by more members in one session than in another. A similar plan of representing towns in certain

[1] Arizona, West Virginia.

[2] Iowa, Nevada, Alabama, Wyoming, Wisconsin, Washington, Utah, Tennessee, Idaho.

sessions causes a variation in the number of house members in New Hampshire from session to session.

Tendency to increase in size

Where constitutions do not definitely prescribe the size of legislative bodies, there is a tendency to increase the number of members. Counties, towns, or other areas of local government are ordinarily used as a basis for representation. No county will desire its representation reduced; and in making a reapportionment, the legislative body, if it has the power, is likely to give increased representation to the communities that have grown in population, but not to reduce those that have declined in relative number of inhabitants. This tendency is strengthened by the self-interest of the members of a legislative body. Suppose there are now three members from a county, and that under a reapportionment, without increasing the size of the body, the number would be reduced to two. One of the three is deprived of the opportunity of election in the future; and which one can not be known in advance. Naturally, all three are opposed to the reduction. A situation similar to this has existed for some years in Illinois. The constitution of Illinois limits the membership of the senate to 51, and that of the house to 153. The constitution commands a reapportionment after each decennial census on the basis of population. But no reapportionment has been made since 1901. Cook County has been growing much more rapidly than other parts of the state, and were a reapportionment made it would mean the giving of additional members to Cook County and the loss of members to the rest of the state. The senators and representatives from other parts of the state are naturally loath to make a readjustment of representation that will necessarily leave some of them without seats.

Geographical representation

In the earlier state governments, representation was based largely upon geographical areas. The substantially equal representation of local areas was not grossly

CHAP. VII

unfair, because of the absence of great inequalities in their population. To a large extent, the idea of geographical representation survives in a number of states. The lower houses of Connecticut, New Hampshire, and Vermont, and both houses of Rhode Island, are based upon town representation; and with the growth of large urban communities this basis has become highly unequal. This inequality is not confined to New England. For example, each county in New Jersey is represented by one senator, although two of the twenty-one counties have a combined population equal to two fifths of that of the whole state. An inequality of representation necessarily results from the choosing of established governmental areas as a basis for representation, unless this plan be combined with that of periodical reapportionments, and of grouping together small governmental areas in case any one of them comes to have a smaller population than that determined upon as the basis for popular representation.

Representation of population

The present representative system is the result of two conflicting forces. In most of the states some attention is paid to local governmental areas in organizing the system. It is common for constitutional provisions to forbid the crossing of county boundaries in the establishment of representative areas. On the other hand, although there has been a persistence of the theory of representation based upon local government areas, to some extent independently of population, there has steadily developed the distinctly American principle of equal representation upon the basis of population. The more common plan to-day is to provide for the periodical reapportionment of membership in the two houses, upon the basis of population. Delaware, however, permits a reapportionment only by constitutional change; and some other states, while providing for periodical reapportionment, limit the basis of representation in such a manner as to preserve an inequality.

Periodical reapportionments

Pennsylvania in 1776 established the plan of reapportionment at certain fixed intervals. A number of constitutions prescribe reapportionments every ten years, following the federal census, but many still provide for a state census for this purpose. Constitutional provisions regarding legislative apportionments are subject to judicial enforcement,[1] but no method has been devised of forcing a legislative body to act at the time commanded by the constitution, if the body itself does not desire to do so. The constitutional command of a reapportionment every ten years in Illinois is mandatory in the sense that the provisions of the constitution regarding reapportionment must be observed by the state legislature. If such provisions are not observed, the courts may, and will, declare a legislative apportionment invalid, although the supreme court of Illinois has been liberal in this matter, and has said that the degree of equality in population among districts is largely for legislative determination. But if a constitution requires a legislative reapportionment at ten-year intervals, this does not compel the legislature to act, and an existing apportionment may thus continue in effect, although highly unequal. The Missouri constitution sought to meet this difficulty by providing "that if at any time, or from any cause, the General Assembly shall fail or refuse to district the state for senators as required in this section, it shall be the duty of the governor, secretary of state, and attorney-general, within thirty days after the adjournment of the General Assembly on which such duty devolves to perform such duty and to file in the office of the secretary of state a full statement of the districts formed by them, including the names of the counties embraced in each district." This provision is no longer in force.[2] The constitution of Ohio goes

[1] The constitutions of New York and Oklahoma expressly provide for judicial review of legislative apportionments.

[2] State *ex rel.* Lashly *v.* Becker, 235 S. W., 1017 (1921). Even under a plan of this type, apportionments may not take place, for in most states

CHAP. VII

further. It lays down in detail the rules upon which legislative apportionments are to be based, and then provides that the governor, auditor, secretary of state, or any two of them, shall every ten years "ascertain and determine the ratio of representation, according to the decennial census, the number of representatives and senators each county or district shall be entitled to elect, and for what years, within the next ensuing ten years, and the governor shall cause the same to be published in such manner as shall be directed by law." Similar powers are vested in the governor of Maryland.

Gerrymandering

In order to prevent gerrymandering, there has been a definite tendency to impose state constitutional limitations upon the methods of legislative apportionment. Gerrymandering existed before 1812, although it derived its name from the Massachusetts apportionment of that year. Beginning with Pennsylvania, in 1790, constitutional provisions came to be adopted requiring that legislative districts shall be composed of contiguous territory and prescribing substantial equality of population. Some states prescribe the basis of equality by a mathematical formula, as that no district shall contain less than four fifths of the ratio of representation. In some states the courts have been strict in construing constitutional limitations of this character. Other courts, such as that of Illinois, on the other hand, have left a fairly wide discretion to legislative bodies.[1] Neither constitutional provisions nor their judicial construction have by any means prevented gerrymandering.

Two sets of districts

The tendency in state constitutional development has been to divide the states into two sets of districts, without very much relationship to each other, the one for the election of senators and the other for the election of

judicial compulsion may not be applied against the governor. Under the Missouri plan, proclamation of the apportionments was to be made by the governor.

[1] For a valuable discussion (now somewhat out of date) of legislative apportionment see P. S. Reinsch, *American Legislatures and Legislative Methods* (New York, 1907).

members of the lower house. The constitution of California provides for a lower house of twice the number of members of the upper house, contemplating that each senatorial district will be divided into two districts for the election of members of the lower house. Each member of the lower house is elected from a separate district, but by this plan the crossing of lines of two types of legislative districts is avoided. Illinois provides that the state shall be divided into senatorial districts, and that three members of the lower house shall be elected from each senatorial district. The plan of single-member districts with substantially equal population has received a great deal of encouragement from the fact that the United States constitution provided for the apportionment of members of the federal House of Representatives to the states upon the basis of population every ten years; and by the further fact that, by act of Congress in 1842, members of the federal House of Representatives became elective from single districts into which the state is divided by action of its own legislature. Single-member districts are, however, by no means universal. In Ohio, when a county is entitled to more than one representative, it elects the whole number at large; and if a county is entitled on the basis of population to more than one senator, it elects senators at large. Wyoming makes each county a single district for the election of the number of senators and representatives to which it is entitled.

Reasons for inequality in representation

Although representation upon the basis of population is an underlying principle in the organization of American state legislatures, this principle is subject to many exceptions. With the development of large urban communities in several of the New England states, a failure to readjust representation in the two houses of the legislature has meant a domination of these states by the smaller rural communities. This development has been a gradual one, and was not at first anticipated; but the

CHAP. VII

seriousness of the present problem is no less real. Before the Civil War a number of the southern states had systems of representation under which the seaboard was distinctly over-represented as contrasted with the western back country. In Virginia and South Carolina, and in some other states, the seaboard, which was distinctly a slave-holding area, preserved its dominance over the western part of the state, which was in the main non-slave-holding, by means of an inequality of representation. Such a reason for inequality has, of course, long since disappeared, and with it has disappeared to a large extent the inequality itself. An interesting illustration of sectional representation will, however, now be found in Mississippi, although its basis is racial rather than sectional. The counties of that state are divided into three groups, and each group is entitled to at least forty-four members in the lower house.

Rural and urban areas

The issue in representation is now largely between rural and urban areas. Those having political supremacy naturally desire to retain it. A representative system, fair when it was established, may in time become grossly unfair. This has been the actual development in some states. Rural areas, once they have a majority in legislative bodies, reluctantly surrender control to the rapidly developing urban communities. Little conflict of interest exists between rural and urban communities upon matters of substantive legislation; and no lines of political division are likely to develop unless forced by a progressive under-representation of large and growing communities.[1]

[1] Illinois presents an interesting example of conflict between rural and urban communities. A decennial reapportionment is commanded by the constitution, but none has been made since 1901. In the meantime the population of Cook County has advanced to nearly half of that of the state as a whole. Controversy over representation took the greater part of the time of the Illinois constitutional convention, assembled in 1920. This convention finally agreed upon a plan permanently limiting Cook County to one third of the members of the senate, but giving this county equal representation in the house.

Limitations in New England

The most general variations from the rule of population as a basis of representation are to be found in some of the New England states. In Connecticut, Rhode Island, and Vermont, each town has at least one representative in the lower house; and in New Hampshire each town with a population of 600 has at least one representative. In Connecticut no town may have more than two representatives, and in Rhode Island no town or city may have more than one fourth of the total number of members in the lower house. These provisions limit strictly the representation of such cities as Providence in Rhode Island, and New Haven and Hartford in Connecticut. The sixteen principal cities of Connecticut contain more than two thirds of the population of the state and have only 32 of 262 members of the house of representatives. In Rhode Island, it was said in 1907 that a majority of the house of representatives was elected by towns with 20 per cent. of the population; and a majority of the senators by little more than 8 per cent. of the population. In the case of Providence, there is a further and stricter limitation of representation in the senate. Each town or city in Rhode Island has only one senator. Providence, with nearly 40 per cent. of the population of the state, has only one fourth of the members of the house of representatives, and only one of 39 senators.

Limitations in Florida and Georgia

In most of the other states the county is taken as the basis of representation, and in more than one third of them each county is entitled to at least one member in the house of representatives.[1] In Florida and Georgia no county may have more than three representatives. This limits the representation of counties containing the larger cities. Thus Duval County in Florida, with more

[1] Alabama, Arkansas, Florida, Georgia, Idaho, Iowa, Kansas, Louisiana, Mississippi, Missouri, New Jersey, New York, North Carolina, Ohio, Pennsylvania, South Carolina, Utah, and Wyoming. In New York one county is not separately represented.

CHAP. VII

than one ninth of the population of the state in 1920, had only two out of 77 members of the house of representatives; and Fulton County, Georgia, with 8 per cent. of the total population, has only three out of 193 members in the house. No county in Oklahoma may have more than seven representatives.

New Jersey and Delaware

In Maryland, Montana, New Jersey, and South Carolina, each county has only one member in the state senate. In New Jersey eight counties have four fifths of the population, and have eight senators, while the other thirteen counties have thirteen members. In Delaware, New Castle County, with seven tenths of the total population, has only 15 out of 35 members of the house of representatives, and 7 out of 17 members of the senate.

Missouri

The Missouri constitution provides that representation in the senate shall be in proportion to population. In the house, a ratio of representation is obtained by dividing the whole population of the state by the number 200. Each county having this ratio is given one representative. Each county having two and one half times the ratio is given two representatives; each county having four times the ratio is given three representatives; and each county having six times the ratio is given four representatives. Above that number one additional member is obtained for each two and one half additional ratios.

Maryland

In Maryland, counties are represented in the house upon the basis of a schedule that approximates to population up to a maximum of six members for counties of more than 55,000 population. Baltimore is divided into four districts of equal population, each of which has six members. This gives Baltimore, with about one half of the population of the state, a total representation of 24 out of 107 members. Each county in Maryland has one senator, and each of the four representative districts in Baltimore one senator, giving Baltimore four of the twenty-seven members of the state senate.

Pennsylvania

In Pennsylvania representation in the lower house is based on population, though each county is entitled to at least one member. But in the senate no city or county is entitled to separate representation exceeding one sixth of the total number of senators. This provision restricts disproportionately the representation in the senate of the city and county of Philadelphia, which in 1920 had more than one fifth of the total population of the state.

New York

In New York, representation in the assembly is based on population (excluding aliens), except that each county has at least one member.[1] For the senate provisions were adopted by the constitution of 1894 which may at some time limit the representation of New York City. No county may have more than one third of all of the senators; and no two counties (or the territory thereof, as organized in 1895) that are adjoining, or are separated only by public waters, may have more than one half of all the senators. The limitation of representation in the senate would restrict New York City if all the counties in that city were combined into one or two; but New York City new includes five counties (two of which have been annexed since 1895), so that it is possible for the city to obtain more than half of the senators if it becomes entitled to such number.

Basis of apportionment

Most of the states recognize population as the primary basis of representation in the two houses. Several states exclude aliens;[2] and this reduces urban representation for a city like New York. The number of qualified voters is the basis of apportionments in some states.[3] Arkansas and Indiana apportion upon the basis of adult male inhabitants; and the Oregon constitution still provides for apportionment on the basis of white population.

Same rule may operate differently

Representation of each local government area necessarily involves inequality. The extent of such inequality

[1] Hamilton County is an exception. It is attached to Fulton County for representation.

[2] Maine, New York, North Carolina.

[3] Massachusetts, Tennessee; and in Texas for the senate.

CHAP. VII

depends, of course, upon the variation in the population of counties or towns, and upon the number of such units to be separately represented. In New York, some inequality of representation exists through the fact that each of the sixty-two counties (except one) is separately represented in the lower house; but this inequality is largely offset by the fact that many of the counties have large populations, and that all of them except those in New York City have substantially the representation to which population would entitle them. Separate representation of each county in the Illinois house of representatives would, on the other hand, lead to much greater inequality, because of the larger number of counties and the greater variation in their population. Illinois has one hundred and two counties; and the division of this number into the state's population would give about 63,000; but more than half of the counties have less than 25,000 inhabitants, and nine have less than 10,000. Fifty-six of the counties decreased in population during the ten-year period from 1910 to 1920. To adopt a county unit in that state would probably mean a progressive development of inequality; while, under other conditions, a county representation plan might result in substantial equality.

Arguments for inequality

It is possible to present some arguments in favor of limiting the representation of large cities in one house of a state legislative body; for it would be unwise to have a single city dominate both branches of a state legislative body. But when the larger communities of a state are so completely under-represented in both houses of state legislatures as they now are in Rhode Island, Delaware, and Maryland, dangers to the continued existence of popular government present themselves. It will always be true that, where there is but one great city in a state, some political prejudice will develop against that city. In this respect the states presenting most difficulty are

Rhode Island, Delaware, Maryland, Illinois, and Wisconsin.

Representation of areas

Equal representation of geographic areas without regard to differences in population is clearly out of harmony with present-day ideas of popular government. There are certain distinct advantages in basing representation upon organized local areas having a solidarity of social and political life, rather than upon artificial districts based solely on population, with shifting lines at each periodical apportionment. Where a state desires to make its units of local government the basis for the representative system, it must establish local government areas of more uniform population, or resort to the plan of uniting areas of smaller population, if it is to maintain a substantial equality of representation upon the basis of population, and is not to have legislative bodies so large as to be ineffective.

ELECTION OF STATE LEGISLATURES

Plurality choice

For the election of members of legislatures all states except Illinois have adopted, with respect to both houses, what we may term the plurality plan. Under this plan, the candidate who obtains the largest vote in his district is elected. This means, of course, that ordinarily the competition for seats is between the two larger parties; although a party not casting a large vote throughout the state may obtain representation in particular districts because of the fact that its strength is concentrated in certain areas of the state. Under the plurality plan, representation in state legislatures is chiefly limited to Democrats and Republicans, though the Progressive party obtained a good many legislative members in 1912 and 1914 because of its great strength in particular portions of certain states; and the Socialist party has also obtained slight representation in some state legislatures.

CHAP. VII

Under the plurality system of electing members of the two houses, it is possible for the party majorities in the two houses to represent an actual minority of the total vote cast in the state as a whole.

Cumulative voting

The Illinois constitutional convention of 1870 proposed for the lower house a plan of cumulative voting which was adopted and has been in force since that date. The adoption of this plan was brought about by two forces. Proportional representation was being agitated to a large extent about the period of 1870, and had gained many adherents. However, the local situation was more influential than theoretical support of proportional representation. The northern part of the state was sending to the two houses of the General Assembly Republican members, and a large portion of the southern end of the state was sending members who were Democratic. The Republican party had considerable strength in the territory that was sending only Democratic members, and the Democratic party had a good deal of strength in the portion of the state that was sending only Republican members. In order to overcome the sectional division in state politics to which this situation gave rise, the cumulative plan of voting was introduced, under which it is provided that "in all elections of representatives aforesaid, each qualified voter may cast as many votes for one candidate as there are representatives to be elected, or may distribute the same, or equal parts thereof, among the candidates, as he shall see fit; and the candidates highest in votes shall be declared elected." The plurality plan was continued for members of the state senate; but each senatorial district elects three members of the lower house under the cumulative system.

Influence on party action

Under this plan any party having more than one fourth of the votes in a senatorial district may elect one member to the house of representatives, if all of the votes of that party are concentrated upon one candidate. A party having less than three fourths of the votes in a

senatorial district can not elect all three of the representatives from the district, if another party has at least one fourth of the votes and concentrates them upon a single candidate. If a party having a distinct majority, but less than three fourths of the votes in a senatorial district, scatters its votes among three candidates, the minority party may be able to elect two candidates by a concentration of its votes upon two. The cumulative system, therefore, made it necessary in Illinois that each party gage its strength in advance of the election, and concentrate its votes in the election upon the number of candidates it thinks it possible to elect. For this reason the Illinois primary law authorized party committees to determine the number of candidates of that party in each district.

Does not aid smaller parties

In the main, the cumulative system has obtained a representation for the two principal parties in Illinois in a very close proportion to the actual votes cast by these parties, and it obtained for the Progressive party in 1912 a strength in the house of representatives proportionate to the votes cast by that party for legislative candidates. However, the system has not obtained much of actual representation for weak minority parties, or for minority parties whose strength may be relatively great but whose vote is scattered somewhat evenly throughout all of the senatorial districts of the state. It is in no way a scheme of proportional representation, except as between the two principal parties.

Weakens influence of voter

The cumulative system has also, almost necessarily, involved the disappearance to a large extent of contests between the two major parties in elections. If each party gages its strength accurately, there will be only as many candidates of such parties in the election as there are places to be filled. This means that ordinarily the only political contest is that involved in obtaining the nomination; and there is usually little active popular participation in the primaries. At the election, the voter has

CHAP. VII

substantially no choice outside of the two larger parties; and under the cumulative system the candidates nominated by these parties are almost certain to win. The party organizations control nominations to a great extent, and the voter has little power of choice, once party nominations are made. The system has reduced sectional representation in Illinois, and has brought about an approximately proportional representation of the two leading parties, but it has of necessity reduced the influence of the voter in the election.[1]

Proportional representation

Proportional representation for the choice of members of the two houses of state legislatures has been urged, because the present methods give small opportunity to the minor political parties, and also because the plurality plan frequently results in distinct inequality even as between the two larger parties. The ideal of proportional representation is that representation shall as nearly as possible be in mathematical proportion to the votes cast by each separate group or party, whatever may be the number of parties. If a district elects only three representatives, this limitation of number means that not more than three groups of voters may be represented, and that the two stronger groups will ordinarily elect the three. Proportional representation, therefore, requires larger districts, each electing a greater number of persons. Suppose, for example, a district having 70,000 voters and electing seven members. A mathematical distribution of the seven members might be as follows:

Republicans	30,000 votes	3 members
Democrats	20,000 votes	2 members
Progressives	10,000 votes	1 member
Socialists	10,000 votes	1 member

Even with large districts, and with a scheme that will count every vote effectively, exact mathematical results

[1] For a full discussion of the cumulative system and its operation see B. F. Moore, *The History of Cumulative Voting and Minority Representation in Illinois*, 1870-1919, second edition, University of Illinois Studies in the Social Sciences, Vol. VIII, No. 2 (1919).

will, of course, not be obtained; but the mathematical result will be clearly much more accurate than under the plurality plan, and more so than under the cumulative system. Both cumulative voting and proportional representation destroy to a large extent the possibilities of effective gerrymandering.

Single transferable vote

The several plans of proportional representation involve a good deal of technicality, though their actual operation is not so complex. The two plans most discussed are: (1) the single transferable vote, and (2) the list system. Under the single transferable vote system, a voter votes for but one candidate, no matter how many candidates are to be elected; but he is permitted to express also his second, third, and further choices. If the candidate for whom he votes has more than enough votes to be elected, the surplus votes are transferred, in the order of the choice expressed, to some other candidate who has not enough votes. If his first choice has not enough votes to be elected, his subsequent choices are counted. In this manner no person's vote is lost.

List system

The list system, long in use in Belgium, and introduced in France in a modified form in 1919, involves the presentation of a list of candidates by each party; the voter then voting for the list, and also expressing his preference among the candidates upon the list. Each party obtains a number of seats in proportion to the votes cast for its list. The party arranges the order of names on the list, and the seats apportioned to that party go to the candidates in the order in which they appear upon the list, unless the voters have expressed a different preference.

Proportional representation and the party system

Under both the single transferable vote system and the list system, the designation of candidates devolves primarily upon the party organization; but the party's control is greater under the list system, because it not only designates the candidates, but usually the order in which such candidates shall be declared elected. The

CHAP. VII

proportional system, in one form or another, has been adopted in a number of countries throughout the world, and has been most vigorously employed in those countries where there are not merely two strong parties, but groups of parties each relatively strong. Where there are a number of parties, the scheme of proportional representation gives, of course, more adequate representation to each of these groups. In the United States, government has practically always been operated under the two-party system. There have been two great parties, one usually controlling the government and having to some extent the responsibility for its operation. A scheme of proportional representation, and to some extent the scheme of cumulative voting, may operate to give in a legislative body a majority to one party, or to a combination of parties, in opposition to the party to which the governor of the state belongs. State government in this country operates best when the governorship and both houses of the legislature are controlled by the same party. A system of proportional representation, so far as it would operate to prevent political harmony between the executive and the legislative branches of government, is to that extent disadvantageous.

Non-partizan elections

Party lines are not drawn to a very great extent in matters of state legislation, yet in substantially all of the American states members of the legislature are elected upon party tickets, without reference to any real issues of state policy involved between the political parties. National issues dominate in our elections, and this results in making the choice of members of state legislatures an incident to national party issues. In order to avoid this situation, Minnesota in 1913 adopted the plan of choosing members of the legislature upon a non-partizan ballot. Each voter in the party primary receives a non-partizan ballot for the nomination of candidates for the state legislature and for certain other positions. The two candidates who receive the highest

vote at the primary become the candidates at the ensuing general election, and the word "non-partizan" is printed after their names. This plan does not seem to have been effective in avoiding the influence of party organizations upon the actual choice of legislators. The Minnesota legislature appears to be non-partizan only in name; while the method of electing members of the legislature has to a large extent destroyed any party responsibility for the work of the legislature in that state.

SESSIONS AND COMPENSATION

Limitations upon sessions

Under the first state constitutions provision was generally made for the annual election of members of legislative bodies and for annual legislative sessions. Frequent and regular sessions of the legislature were deemed essential safeguards of popular rights, and were at this time thought sufficient safeguards. Distrust of legislative bodies soon developed, and the trend has been rather steadily away from both annual elections and annual sessions. The tendency has been to make the regular sessions of legislative bodies less frequent, and this has, of course, involved a less frequent election of members. It will be noted from the table on page 164 that in a majority of the states senators are elected for four years, and representatives for two years. There has also been a pronounced tendency toward the limitation, by constitutional provision, of the length of legislative sessions. The table on page 164 indicates the present situation with respect to this matter in the several states. It will be noted, incidentally, that most state legislative bodies meet in January of odd years.

Indirect limits on length of session

In explanation of this table, certain statements should be made as to limitations upon the length of sessions. A number of states do not absolutely restrict the sessions to the number of days specified in the table. Some prescribe that compensation shall cease after a certain num-

CHAP. VII

ber of days, or shall not exceed a certain maximum.[1] Others prescribe a reduced compensation after a certain number of days.[2] In West Virginia and Arkansas the length of sessions specified may not be exceeded unless by a vote of two thirds of the members elected to each house, and in Virginia by three fifths of the members elected to each house.

Biennial sessions

The tendency toward biennial sessions of state legislatures has been a steady one.[3] Massachusetts in 1918 provided for biennial elections, but continued the plan of annual sessions. Iowa, in 1904, adopted the plan of biennial sessions. In South Carolina a constitutional amendment for biennial sessions was approved by the people in 1904, but did not come into effect because in that state a constitutional amendment must be ratified by the legislature subsequent to its approval by the people. The only states now having annual sessions of their legislatures are Georgia, Massachusetts, New Jersey, New York, Rhode Island, and South Carolina. Alabama has quadrennial sessions. Mississippi tried for some years a quadrennial session with an intermediate short session; but it was usually found necessary to extend the length of the short session, and the state returned to biennial regular sessions. A number of states limit not merely the length of regular sessions, but also the length of special sessions.

Split sessions

California and West Virginia have, by constitutional amendment, adopted the plan of split legislative sessions. Under the California plan the legislature continues in session for a period not exceeding thirty days, "whereupon a recess of both houses must be taken for not less than thirty days. On the reassembling of the legislature, no bill shall be introduced in either house

[1] South Carolina, Virginia, Oregon, Kansas, North Carolina, Tennessee, Idaho, Rhode Island, Delaware, Arkansas, Arizona.

[2] Texas, Missouri, Oklahoma.

[3] See Bulletins of the Massachusetts Constitutional Convention, I, 359, *Biennial Elections and Legislative Sessions.*

without the consent of three fourths of the members thereof, nor shall more than two bills be introduced by any one member after such reassembling." This plan was adopted in 1911 with the idea that the thirty-day recess would give members a better opportunity to consider bills that had been introduced, and to obtain the views of their constituents. The plan does not seem to have worked very satisfactorily.[1] A scheme of split sessions was adopted by West Virginia in 1920, and was employed in the session of 1921. Alabama has also used the plan, although without any constitutional change.

Special sessions

Attention should be called to the conditions under which special legislative sessions may be assembled. The New Hampshire constitution permits the legislature to assemble at such times as it may judge necessary; but, aside from this state, special sessions are in all cases convened by proclamation of the governor, though special sessions must be called in Virginia on the application of two thirds of the members, and in West Virginia on the application of three fifths. In Massachusetts and New Hampshire, special sessions may be called by the governor, with the advice of the governor's council, and in North Carolina with the advice of the council of state. Such sessions are in a number of states definitely limited in length. Most of the states expressly provide that the governor shall state, either in his proclamation or to the two houses after they are convened, the purposes for which the special session has been called; and that the session shall be limited to these purposes. There are some exceptions to this rule. For instance, in Arkansas a special session may transact no other business until that specified in the proclamation is disposed of, but may thereafter take up other matters. Difficulty

[1] For a discussion of experience in California with this plan see Hichborn's book giving detailed account of the California legislative session of 1913, pp. 15 and 17.

CHAP. VII

has arisen from the fact that in some states the governor must indicate by proclamation the purposes for which a special session is called, and must then call another special session if he desires other matters to be considered after the legislature has convened. Some constitutions avoid this difficulty by providing that the legislature shall act only on subjects designated in the proclamation or presented by the governor after the legislature is in session. In New York it has been held that a special session may impeach the governor, though naturally such a purpose would not have been specified in the governor's call. A similar view is taken in Texas.

Compensation

Many constitutions definitely provide for the compensation of members, but others leave this matter to be determined by the legislative bodies themselves. For example, the constitution of Illinois leaves this matter to the discretion of the two houses, and these bodies have fixed the compensation at $3,500 for the two-year period. In many states compensation is upon a per diem basis. Where a legislature is given authority to fix the compensation of its members, provision is ordinarily made that such compensation may not be increased or decreased during the term for which members have been elected.

Mileage

Legislative abuse with respect to additional compensation, concealed under the guise of expenses, has led to detailed provisions in many constitutions regarding mileage and incidental expenses. Most of the mileage provisions in state constitutions contemplate that mileage shall be paid only for going to the state capital at the beginning of the session and returning at the close of the session. In many states it has become customary for members to return to their homes over each week-end during a legislative session. This practice has some advantages, in that it keeps the members more directly in touch with their constituents, and the advantage has been recognized by legislation in Ohio providing for the pay-

ment of weekly mileage. A similar plan was incorporated in the proposed constitution rejected by the people of New York in 1915, and is provided for by legislation of 1921 in Illinois.

CHAPTER VIII

THE WORK OF THE STATE LEGISLATURE

CHARACTER OF LEGISLATIVE WORK

Policy-determining organ

THE legislative department has broad powers to strike out along new paths and develop new lines of policy for the state. Many matters of state policy are, indeed, settled by constitutional amendments proposed through legislative action or popular petition, and by revisions or amendments proposed by constitutional conventions. But it is out of the question to do much through occasional constitutional enactments in the way of developing new state policies, and the state legislature is the one body meeting at frequent and regular intervals for this purpose. The principal activities of state legislatures may be outlined as follows:

Revenue and appropriations

(1) State legislatures make appropriations for the support of all parts of the state government, and pass laws providing for sources of revenue in order to meet the appropriations so made.

State governmental organization

(2) They enact laws with reference to all matters affecting state governmental organization which are not regulated in detail by the state constitutions. With the enormous increase in recent years of the things done by state government, the administrative organization for the doing of these things is large and complex. Much of the time of each legislative session is devoted to this state administrative organization and its powers.

Local governing bodies

(3) State legislatures pass laws regarding the organization and powers of the various local governing bodies of the state. In all states except those that have adopted

the plan of granting certain powers to cities by express constitutional provision, cities derive all of their powers from state legislation, as do substantially all other local governing bodies. County and township government are to some extent provided for by constitutions themselves, and in some constitutions there are detailed provisions for the organization of local government. But in general both the organization and powers of local governing bodies within the states are subject to legislative control, with important exceptions, of course, as to those states that have adopted municipal home rule.

Private rights

(4) State legislatures pass laws regulating the private relationships of one individual to another in the state. They determine, or may determine, the form and obligation of contracts, the form of deeds, mortgages, wills, and other transactions among private individuals, and substantially all of the procedure of the courts in enforcing the rights of parties arising out of their relationships one with another. Civil relationships of individuals are in most of the states regulated in large part by the "common law."

Common law and the courts

The common law is a body of law developed originally by the English courts and brought to this country by the settlers of the seaboard colonies. With the migration of population from the older states, this body of law has been carried to the newer states, though it has been altered in many respects by the courts of the several states to suit their specific and differing needs. In bringing about this adjustment, the state courts have to some extent themselves made law; and the details of the common law have in this manner been somewhat varied from one state to another. In most states we find statutes expressly adopting the principles of the common law, "so far as they are applicable"; and this has given to the courts a discretion in the modification of the principles of this body of law. If the law has not been prescribed by statute, and there arises a legal issue that has not

CHAP. VIII

previously been acted upon by the courts, the courts of a state will look to the decision of the English courts, and of other state courts, in order to make up their minds as to what is the common law to be applied in their state. They are, however, not bound by the decisions either of English courts or of the courts of other states.

Common law and legislation

The rules of the common law are at all times subject to change by legislative act, and in order to discover what rules of law on a given subject are in force in any state, it is necessary to look first to the legislative acts in force in that state. If the matter is not fully covered, or not covered at all by such legislative acts, it becomes necessary to examine the printed decisions of the courts of that state, in order to discover whether such courts have announced the rule of the common law that is to apply. A few states have substantially codified their law. That is, they have sought to embody all of the principles of the common law in statutes, so that the whole body of the law may be found in legislative enactments. This result, however, is never achieved, because statutes, no matter how carefully drafted, are either so general in form that they must be applied by construction of the courts to particular cases, or so indefinite or ambiguous that they may obtain a definite meaning only by judicial decision. In the states that have sought to codify their law completely, a greater portion of the law may be found in legislative enactments; but the decision of the courts must still be looked to in order to discover the meaning of that law.

Criminal law

State legislatures also pass laws for the punishment of crimes committed within their border, and for the regulation of the methods of procedure in courts for the trial of persons accused of crime. A great number of things punishable by state legislative acts are wrongful in themselves, such as theft, murder, bigamy, and forgery. Others are not in themselves wrong, but are prohibited because their commission would interfere with

the welfare of the community, or with the rights of others. For instance, the motor-vehicle acts in the various states provide that vehicles traveling upon the public highways shall give the right of way to other vehicles approaching along intersecting highways from the right, and also prohibit the driving of a motor-vehicle by persons under certain ages. These provisions of law are enacted, not because the forbidden acts are wrongful in themselves, but for the protection of others.

Distribution of activities

On the basis of the outline of legislative work just presented, it may be of interest to illustrate the distribution of laws of the four different types enacted by the state legislative body of Illinois in 1917 and 1919. It must be borne in mind that a large number of laws relating to state and local administrative matters also punish violations of law. Laws placed in one group may also be classified in another. But the four groups in the table below roughly agree with the four types of state legislative activity outlined above.

ILLINOIS GENERAL ASSEMBLY

	1917	1919
State appropriations	63	67
Laws relating to state administrative matters.	150	177
Laws relating to local administrative matters.	108	171
Laws relating to private rights	17	14
Totals	338	429

Local and special legislation

There has been a great deal of shifting from one period to another in the character of laws enacted by state legislative bodies. In the Illinois legislative session of 1869, for example, four large volumes of special laws were enacted, as contrasted with one small volume of laws of general application throughout the state. Since 1870 there has been almost no special legislation in Illinois. In some states, as in Massachusetts and Maryland, there is still enacted at each legislative session a

CHAP. VIII

large mass of special legislation affecting only specific communities or specific conditions.[1]

Limitations upon special legislation

Most of the state constitutions, however, now contain elaborate lists of matters upon which special legislation is forbidden, and by this means seek to prevent such legislation. Abuses through such legislation are in other states sought to be prevented by constitutional provisions requiring notice before such proposed legislation is introduced or enacted. The Michigan constitution of 1908 substantially stopped a great mass of special legislation in that state by providing that: "The legislature shall pass no local or special act in any case where a general act can be made applicable, and whether a general act can be made applicable shall be a judicial question. No local or special act except acts repealing local or special acts, in effect January 1, Nineteen hundred and nine, and receiving a two-thirds vote of the legislature, shall take effect until approved by a majority of the electors voting thereon in the district to be affected."[2]

Advantages of Michigan plan

The plan of enumerating a large number of matters upon which special legislation shall not be enacted commits to the courts control over special legislation, by virtue of the fact that the courts enforce these constitutional provisions against the legislature. The Michigan plan is more satisfactory, because it does not seek to make a complete enumeration, but merely vests in the courts the authority to control as to the necessity for special legislation,[3] and also adds an additional check by providing that there shall be a popular vote adopting the act in the community to be affected thereby. The danger of this plan is that the courts may construe the term

[1] Upon the present mass of special legislation in some states see a table in Massachusetts Constitutional Convention Bulletins, II, 481.

[2] As amended in 1915.

[3] A plan similar to this was first adopted by Missouri in 1875, and may now be found in Minnesota (1892), Alabama (1901), Kansas (1906), and Michigan (1908). See F. E. Merrills, "Some Aspects of Judicial Control over Special and Local Legislation," *American Law Review*, XLVII, 351-364 (1913).

"special legislation" so broadly as to give a more complete judicial control over any type of legislation of which the court disapproves. There has been a tendency in this direction in Missouri and Minnesota.

LEGISLATIVE PROCEDURE

Legislative procedure in constitutions

State constitutions lay down a large number of rules as to methods of legislative procedure and as to the form of legislative enactments. It is common to find a constitutional provision as to the number of members who shall constitute a quorum of each house, and also to the effect that no bill shall be passed unless it receives the vote of a majority of all members elected to each house. It is also common to find a constitutional provision that no act shall contain more than one subject, which shall be expressed in the title. This provision was included in the Georgia constitution of 1798 because of the fact that the legislature of Georgia in 1795 was corrupted in such a manner that it substantially granted away the public lands of that state by the terms of an act whose title gave no notice of this fact. It has also been customary by the terms of constitutions to lay down rules as to the expulsion of members of legislatures and as to the punishment of members for contempt. The doors of each house and of the committee of the whole are ordinarily required to be kept open, except in such cases as, in the opinion of the house, require secrecy. Substantially all state constitutions require each house to keep a journal of its proceedings, and to publish such journal.

Rules to protect members

A common type of constitutional requirement is one that "no law shall be revived or amended by reference to its title only, but the law revived or the section amended shall be inserted at length in the new act." Clauses have been coming into state constitutions in recent years, also, requiring that every bill shall be printed, with all amendments thereto, before final passage. Provisions of this

CHAP. VIII

type are intended to make a bill indicate upon its face what it seeks to accomplish, and to prevent the voting upon bills before the full and final text is before the members of the legislature.

Three readings

Provisions that every bill shall be read or read at large upon three separate days in each house are also still common. A requirement of consideration of a bill by each house on three separate days is desirable, as a means of obtaining deliberation and of preventing the enactment of legislation by surprise. The requirement of three readings at large has been copied from English parliamentary procedure, and was largely insisted upon in early days as a basis for giving information to members of a legislative body, at a period when printing was either non-existent or difficult and the ability to read was not general. The requirement of three readings at large is not now necessary, and is substantially disregarded by legislative bodies. Three readings in full are now insisted upon in legislative bodies only as a means of obstruction. Otherwise the constitutional requirement is disregarded. When a bill is read, members do not listen, for it is easier to read the printed bill themselves. So far as it is observed, the constitutional requirement involves a useless waste of time. Modifications of this rule are therefore coming into state constitutions.

Other rules

No effort will be made here to outline in detail the types of limitations imposed by the various constitutions upon the enactment of legislation. Many state constitutions contain numerous details not here expressly enumerated. Resort must be had to each state constitution in order to discover the detailed provisions with respect to these matters. It may be worth while to refer again, however, to the fact that in the states where special legislation is still permitted there are a number of provisions regarding the enactment of such legislation.

Time when laws take effect

Many constitutions expressly prescribe the time when legislative acts shall come into effect. Some prescribe a

certain definite date. For example, the constitution of Illinois provides that legislative acts shall take effect on the first day of July after their passage, unless a vote of two thirds of the members of each house otherwise directs. There is no limit upon the length of session of the legislature in Illinois, and the state legislature ordinarily remains in session until about the first of July, so that laws come into effect before their text can be made available to the people of the state. A number of states provide that laws shall come into effect within a certain definite period after the legislative adjournment, fixing this period sufficiently long for the laws in printed form to be issued, and permitting an extraordinary vote of the legislature to make exceptions for laws that need to come into immediate operation.

Types of rules

Constitutional provision regarding legislative procedure in the enactment of laws are of two types: (1) those whose violation may be discovered by examining the text of the law itself, and (2) those whose violation may be discovered only by examining some evidence other than the text of the law itself.

Tests of compliance

The constitutional provision that a bill shall relate to only one subject, which shall be expressed in the title, is one, compliance with or violation of which appears upon the face of the act. A requirement that a bill, with all amendments thereto, shall be printed before final passage is one, compliance with or violation of which does not appear upon the face of the act. This situation has presented to the courts an issue as to the extent to which they would look beyond the text of an act, in order to determine whether the measure has been validly adopted. Some state courts have said that they will pass upon the validity of an act only in so far as the issue of its validity may be determined by examining the terms of the act itself. This rule, of course, leaves completely to legislative discretion the compliance or non-compliance with constitutional provisions which are not reflected upon the

CHAP. VIII

face of legislation enacted. Many other state courts say that they will examine legislative journals in order to discover whether there is a record of compliance with the constitutional requirements, as to such matters as three readings, printing before final passage, and the sufficiency of the legislative vote in the two houses. Courts that take this view have properly said that they will not permit evidence of violations of the constitutional requirements to be presented, other than that found in the journals which are the official records of the legislative bodies. It is therefore possible for legislative bodies to disregard constitutional requirements of this character, provided they make sure that journal entries show compliance with such requirements. If, therefore, legislative bodies are careful in the preparation of their journals, it is immaterial whether the courts take the one view or the other.

Rules adopted by two houses

Each house of a state legislature has full authority to adopt its own rules, and the two houses together have authority to adopt joint rules for the transaction of business between the two. Most matters of legislative procedure are regulated, not by constitutional provisions, but by legislative rules.[1] All constitutions provide that the lower house shall be presided over by a speaker chosen by the members of the house. Most of the states have a lieutenant-governor who presides over the senate, although in some instances the senate elects its own presiding officer, who in most such cases succeeds to the governorship in case of a vacancy.

Committees

The rules of all legislative bodies provide for a committee organization in each house, and committees really perform the detailed legislative work. Committees of the lower house of state legislatures are ordinarily appointed by the speaker, although this is not the case in

[1] The most thorough and satisfactory discussion of legislative rules will be found in H. W. Dodds, *Procedure in State Legislatures*, Annals of the American Academy of Political and Social Science, Supplement (May, 1918).

Nebraska, Utah, and possibly some other states. In view of the fact that the presiding officer of the senate is in most cases independent of the senate itself, the senate committees are in many cases not appointed by the president of the senate, but are elected by the senate, either with or without the recommendation of a committee on committees. Where the lieutenant-governor as president of the senate actually makes appointments, those appointed upon committees are likely to be determined not so much by the president as by the leader or leaders of the majority party in the senate. The powers of committees vary materially under the rules of the different states, but in general committees have large powers, and are able to defeat bills referred to them, not merely by means of adverse reports, but by failure to make any report whatever. This is not the case in Massachusetts and in some other states. However, in the ordinary American state legislature the committees virtually control the fate of measures referred to them.

Joint committees

In Massachusetts, Maine, and Connecticut the system of joint committees has been developed most effectively. In Massachusetts most of the committees are joint committees. Under this method of conducting committee work, the two houses coördinate their work more completely, and there is need for committee hearings and actions only once, whereas in most of the states the committees of one house act independently of those of the other house. Much delay in the actual consideration of measures is caused by this plan, as well as a great deal of loss of time to those who may wish to appear before legislative committees in order to advocate or oppose legislation.

Number and size of committees

In most state legislative bodies there are too many committees, and the committees are too large. In the Illinois senate of 1921 there were forty-three standing committees, although only fifty-one members of the senate itself. In recent years each member of the Illinois

CHAP. VIII

senate has been on an average of eleven committees; and in 1919 one member of the senate was on twenty-eight committees. This is by no means an exaggerated illustration. In the Illinois senate it has been the practice to have as many committees as there are Republican senators, so that each majority senator may have a chairmanship, and in this way the number of senate committees has increased from thirty-three in 1917 to forty-three in 1921. In some states—particularly in Vermont, Massachusetts, Wisconsin, and Rhode Island—there is a small number of committees; and each member, therefore, serves upon a relatively small number of committees. No member of the legislature is able to divide himself among eleven or more committees at the same time. Of course not all committees will be sitting at the same time. But if a legislative member is on several important committees he is not really able to do his work effectively. The committee system in many of the state legislatures has ceased to be an effective means of preparing business for the larger legislative bodies upon the basis of careful deliberation. In some states legislative committees are made up of a large number of members, but with some whose action in the committee can be controlled, and who will be notified to be present at committee meetings when their votes are needed. In some cases legislatures have a great number of small committees. To be effective, committees must be large enough for their membership to represent the sentiment of the legislative body itself.

Committee organization ineffective

It has been possible to maintain a cumbersome committee system in most state legislatures only because of the fact that many committees are useless and unnecessary. Some committees have little or nothing to do, and membership on them does not materially burden those who are members of other and more important committees. In Illinois the house and senate committees on appropriations and on judiciary probably did fully

one half of the committee work of the two houses during the 1917 session. Some committees did not meet at all, and others met infrequently. The legislative committee organization in almost all of the states needs to be completely reorganized, with a smaller number of committees and with fewer members on each committee, so that these committees may actually present careful reports upon the matters submitted to them. In the reorganization of legislative committees, if it is not desired to follow the practice of having joint committees, a close coöperation between committees of the two houses may be established by organizing the committees in the two houses with the same names and jurisdiction. In a number of the states the committees of one house are organized without much reference to the committee organization of the other house, so that it is difficult for the committees to coöperate through joint hearings, joint sub-committees, or otherwise. Even without joint committees of the two houses, much could be done in the way of joint action in hearings upon bills and in considering such bills. If legislative committees are to be reconstituted, a great deal may be said, furthermore, in favor of coördinating the committee organizations of the two houses with the executive organization of the state government. Legislative committees necessarily consult with the executive departments of the state upon subjects that fall within the field of those departments, and there would be a distinct advantage in having legislative committee organization planned to fit in with the state administrative organization.

No effective control over committees

In most of the state legislatures the planning of regular times for committee hearings and committee meetings has been difficult because of the large number of committees and of the fact that each member serves upon a number of committees. Definite plans as to the times for committee hearings have been worked out in some states, but satisfactory plans by which both the public

CHAP. VIII

and committee members may know well in advance the times of committee meetings and committee hearings can not be provided as long as the present unsatisfactory conditions of committee organization exist. One of the chief difficulties with state legislatures results from the failure of committees to make prompt reports upon matters referred to them. For the protection of committees themselves, and in order to avoid the reporting of bills in large numbers near the end of legislative sessions, there should be some rule requiring prompt report upon referred bills. In many state legislative bodies, a large number of bills is tabled toward the end of the legislative session, because such bills have not been reported out of committee at all, or because they have been reported so late that any further action upon them was out of the question.

Committees do not serve their purpose

The true function of a legislative committee is to prepare business for and to recommend action by the larger body, of which the committee is theoretically an agent. Ineffective committee organization not only results in committees performing their work unsatisfactorily, but at the same time destroys the possibility of their being controlled by the legislative body itself. Committees are intended to be servants of the larger body, but are actually its masters; or, it should rather be said, those who control the present cumbersome organization of committees are the masters of the legislature. The fate of a bill is now determined by the committee to which it is referred, equally as much as, if not more than, by the attitude of the members of the legislature. A simpler organization is necessary if members of legislative bodies are really to control their own proceedings. Legislative rules in most of the states now permit bills to be withdrawn from committees by formal vote, or place them upon the legislative calendar for action without committee report if a committee does not report within a

certain time. But such rules do not enforce themselves,[1] and even if they did they would not help a great deal. What the legislative body should expect from its committees is a report, either favorable or adverse, within a reasonable period after a bill has been referred. An adverse report should be the basis for immediate disposal of the bill.

Introduction of bills

The ordinary procedure in state legislatures with respect to bills may be briefly outlined. In almost all state legislatures bills are introduced by individual members without much limitation. Many legislative bodies have rules that bills shall not be introduced after a certain date; but ordinarily these rules are suspended by unanimous consent whenever a member desires to introduce a bill. There are also numerous constitutional limits upon the time of introducing bills. Under the split-session plan in California and West Virginia, bills may not be introduced after the legislative recess except under extraordinary conditions. Several states forbid the introduction of bills after the legislature has been in session for a certain number of days. Nebraska forbids such introduction after the expiration of twenty days, except as the governor may by special message call attention to the necessity of passing a law upon a matter embraced in the message. Some other states forbid the introduction of bills within a certain number of days before the final adjournment. Constitutional provisions of this character have not been successful in obtaining a program of legislative work early in the session.

Responsibility of individual members

In the main, the individual members assume no great responsibility for the majority of the bills that they introduce. The theory of most American state legislatures is that bills may be introduced only by members, but as a matter of fact any one who seriously desires to

[1] See B. F. Shambaugh [ed.], *Statute Law-Making in Iowa*, p. 224, for an illustration of the disregard of this type of rule.

CHAP. VIII

have a bill introduced may persuade a member to introduce it for him. The actual sources of bills are as various as the economic, social, and political influences in the state. Some bills for which members are unwilling to take the responsibility are introduced "by request," and these words are noted upon the printed bill. This substantially means that the member introducing the bill disavows any responsibility for it. However, this is not usually done, even though the member has no intention of interesting himself in the bill. In Massachusetts most bills are introduced by petition from without the legislative bodies.

Steps in two houses

After a bill is introduced it is ordinarily referred at once to a committee. Under the practice of most state legislative bodies, the bill has its first reading before being referred to committee, although in some states this plan is not followed. Upon the report of the bill by the committee it is placed on second reading, and is in the stage for the proposal of amendments. After the second reading a bill is ordinarily transcribed, with such amendments as have been made therein, and is then ready for third reading. On third reading there is opportunity for debate, but ordinarily not for amendment. After such debate as the members may desire, the bill is put on final passage; and constitutional provisions ordinarily require that the yeas and nays be called and entered on the journal. Assuming that the bill has been introduced in the lower house and has passed that house, the bill is then taken by messenger to the senate. The house bill coming to the senate is at once referred to the proper senate committee. After the report by the senate committee, bills are then successively given three readings, with the second reading the stage for amendments, and the third reading the stage for debate without amendment. There is little effective debate in state legislative bodies. What is termed "debate" frequently resolves itself into a brief explanation of the bill. If the bill is

passed by the senate in the form in which it came from the house, it is then enrolled for presentation to the governor, and is thereupon presented for approval.

Conference committees

If a house bill is passed by the senate, but is amended by that body, it must go back to the house of representatives. The house of representatives may either concur in the senate's amendments, or non-concur and request a conference. If a conference is asked the two houses appoint committees which meet and confer. Disagreements are ordinarily adjusted by these conference committees, and the results of a conference are reported back to each of the two houses. If the two houses adopt the conference committee report, the bill becomes law. Points of difference are often resolved by informal conferences, but in some states conference committees are frequently employed.

Absence of legislative program

In order to present a clearer picture of state legislative work, it is necessary to comment more fully upon certain matters involved in the process of legislation. No definite legislative program is submitted to state legislative bodies when they assemble. Each separate office of the state government naturally thinks to some extent of the types of legislation it desires. Organizations of county and local officers, and some unofficial bodies, will have specific measures which they desire to see adopted. Frequently commissions will have been appointed at the previous session to report upon matters relating to some specific problem. However, little in the way of a consistent policy as to proposed legislation will have been worked out by any responsible group; and the members of the legislature will have given all of their time to their own affairs until the period just preceding the legislative session.

Party lines

When United States senators were elected by state legislatures, this fact made these bodies more important to the political parties than they now are. In some

CHAP. VIII

states judges of various courts[1] and some other officers are still elected by legislatures.[2] However, the importance of party lines in state legislative work is slight; yet in most of the states both houses of the state legislature are dominated session after session by one of the two great parties. Although party lines are infrequently drawn in the actual votes upon bills,[3] what there is of legislative program is often furnished by the dominant party under the leadership of the governor. Such a program, however, is usually limited to a few measures, and there is no program whatever as to the great mass of proposed laws. The lines among the members of the two houses shift in the votes from measure to measure. In one case the line of division is, or was, that between the "wets" and the "drys." In another it is that of the employers as against those representing organized labor. Occasionally, too, a line of division presents itself as between country and city members. Upon the great mass of substantially immaterial legislation there is no definite alignment upon a party basis or upon any other basis.

The lobby

The lobby is almost as important in legislation as the two houses and the governor. There is no serious objection to legislative lobbies that are definitely open and aboveboard. The lobby is but another name for the forces presenting themselves to the members of the two houses for and against particular items of proposed legislation. The labor group constitutes one lobby; the manufacturing group, often opposed to the things desired by the labor group, and also itself desiring certain legislation, forms another lobby. Anti-saloon leagues have

[1] Vermont, Rhode Island, Virginia, South Carolina, New Jersey.

[2] The state treasurer in New Jersey, Maryland, New Hampshire, Maine, Tennessee; the secretary of state in New Hampshire, Maine, and Tennessee; comptroller or auditor in New Jersey, Virginia, Tennessee; the attorney-general in Maine; the commissary general in New Hampshire; the state printer in Kansas; and the governor's council in Maine.

[3] See A. Lawrence Lowell, in *Report of American Historical Association*, 1901, p. 337.

constituted some of the most effective lobbies in American state legislatures. Agricultural interests constitute a lobby. Inasmuch as state legislatures are the bodies for the establishment of future state governmental policies, all of the organized forces of the community desiring or fearing the establishment of a new policy naturally seek to bring their influence to bear upon legislation. The term "lobby" is employed as a designation of all these forces, although the forces may be viewed either as a whole or as a series of more or less separate lobbies. A lobby oftentimes begins work in advance of the legislative session, and seeks to bring influence to bear in the nomination and election of members who are to form the legislature. Much lobbying is done by the writing of letters to the members of the legislature. Every member receives numerous letters during a session for and against particular measures, and there has been also a growing use of telegrams. Many of the letters and telegrams are of a form type and can be readily traced to a single source.

Hearings

The practice of holding hearings on important matters of proposed legislation is of great value, and has had an extended development within recent years.[1] Hearings for the purpose of obtaining information are important and valuable. However, hearings upon proposed legislation have in many cases degenerated into demonstrations upon the part of interests favoring and opposing particular pieces of legislation. Hearings have thus become the means by which lobbies may make open demonstrations upon matters affecting them.

Lobbies of public groups

In many states lobbies of civic organizations have developed for the primary purpose of protecting the public interest, as distinguished from the various lobbies that are definitely organized for the purpose of advancing private aims. More influential in legislation, however, are lobbies representing the official interests of

[1] See Lowell, *Public Opinion and Popular Government*, pp. 249-256.

CHAP. VIII

state and local governing bodies which desire legislation or desire to defeat legislation. Locally selected officers naturally have more political influence than self-constituted civic organizations.

Influence of the lobby

It has often been charged that under present conditions legislative bodies are mere passive instruments upon which the different forces desiring legislation register their will. This is not true, for the forces that are brought to bear upon state legislative bodies are diverse and contradictory forces. But it is true that meritorious measures often fail in state legislatures because of the absence of outside pressure. If a measure introduced into a state legislature does not have behind it some definite interest upon the part of legislative members, and is not urged by influences from the outside, its possibility of passage is slight. The influences not represented in legislative lobbies are apt to be neglected in the final result of legislative enactments. To-day the lobby furnishes members of the legislature their chief source of information upon many proposed measures. Effort has been made in a number of states to regulate the lobby, by requiring that lobbyists be registered and by other means.[1] Such efforts have on the whole proved of little value. No lobbyist particularly objects to being registered, and this in no way interferes with his using improper influences if he desires to do so. As a matter of fact, the more experienced lobbyist does not seek to interview members of the legislature in the lobby or around the door of the legislative body itself, but seeks to exercise his influence either in a more casual way or through influential constituents of the member.

Control of legislative members

There is much newspaper and magazine discussion of sinister influences in legislation. Occasionally bribery plays a part in the enactment or rejection of proposed measures, but more often the influences are of a type not

[1] See, for example, Massachusetts General Laws, 1921, Chap. 3, Secs. 39-50.

regarded as highly improper in ordinary business and social affairs. A member is often elected because his views on certain questions are known to be in accord with the views of those controlling the nomination and election; if his views on these questions change, he might fail of reëlection, but he may be altogether unconscious of any possible restraints upon his action; in fact, such a member may often show an undesired independence, but be continued in office because of a feeling that his usefulness upon other questions is great. Those desiring legislative action naturally regard a convinced advocate as more desirable than an unwilling supporter. Some members are completely independent, and make up their minds without consultation and without reference to outside influences; but their number is fortunately as rare in legislative bodies as it is elsewhere in life. Some members receive instructions from political leaders or bosses, who in turn receive orders from those who control them. Some take bribes. However, a member is usually not controlled, either directly or indirectly, in his action upon the great mass of legislative proposals. Such control as is exercised over him relates to only a few measures at any one session. Only occasionally does a measure present itself in which any one has a sufficient interest to offer a bribe. One member may find it necessary, because of his business, political, or social relationships, to vote for a measure; while another member votes in opposition because of the same influences. Frank legislators have occasionally said that all members have their bosses; and there is much truth in this remark. But upon most legislative questions all members must make up their own minds, without orders either direct or indirect; in doing this they unfortunately have no source of accurate and impartial information.

Compromise as an influence in legislation

Legislation, as it is finally enacted, is the result of various forces. Much of the success of a legislative body depends upon team work, and for this purpose some

CHAP. VIII

continuity of membership is essential. Where a group of people have not previously had the experience of working together, little is likely to be accomplished unless they are able quickly to develop a definite leadership. The word "compromise" is sometimes applied to the result of legislative action as if it involved something sinister, and the word has a sinister meaning if it relates to a compromise of principle. Most issues of legislation, however, involve not so much of principle as of getting a definite unity back of a workable plan. Issues of fundamental principle are much less frequent than are issues of expediency; and compromise is a necessary element.

Need for organization to correct technical defects

One of the most serious difficulties is that in most states no machinery exists in either house, or in the two houses combined, for the careful scrutiny of each bill before final passage, in order to see what defects there may be in it and how it fits in with existing legislation. Such a scrutiny is accomplished in Massachusetts by a committee on bills in the third reading. The Massachusetts house rule provides that "the committee on bills in the third reading shall examine and correct the bills which are referred to it, for the purpose of avoiding repetitions and unconstitutional provisions, insuring accuracy in the text and references, and consistency with the language of existing statutes; provided that any change in the sense or legal effect, or any material change in construction, shall be reported to the house as an amendment." This committee has a trained secretary. A somewhat similar committee for bills on third reading exists in Wisconsin. In Nebraska the correction of obvious defects in bills as introduced is sought by a rule of the house of representatives "that the speaker, the chief clerk of the House, and the director of the Legislative Reference Bureau are hereby appointed a committee to whom shall be referred all bills after first reading, for the purpose of consolidating duplicates in order to save

expense of printing and for the correction of obvious errors in the form of such bills. No change of any kind shall be made in the bills so referred without the full consent of the member or members interested in said bills. All bills so referred shall be returned to the chief clerk's office within forty-eight hours from their receipt." Through this committee, defects were corrected in 114 out of 803 bills introduced in the Nebraska house in 1917.

Mass of legislative work

Under the plan of unrestricted introduction of bills in each house of the state legislature, great numbers of bills are introduced. Apparent limitations are contained in the rules of some legislative bodies, but they really do not restrict in a material way the freedom of members in this respect. The introduction of bills covering the same subject is quite common, and in most states identical bills will to a very large extent be introduced in each of the two houses. For example, in the Illinois legislative session of 1917, 1,041 bills were introduced in the house and 612 in the senate. Of these, 230 were identical bills. Of the 1,653 bills introduced, 338 actually became law. This statement with respect to the number of bills introduced, the number of duplicate bills, and the comparative number that became law is fairly representative of the situation in other states.

End of session rush

The most serious problems in connection with state legislation present themselves in what may be termed the "end-of-the-session rush." A large number of legislatures do the greater part of their work in the last few weeks, or even the last few days, of the session. Several constitutions provide that no bills shall be enacted on the last day of the session. But this, of course, has the result of merely setting back the rush for a day. In the New York Assembly session of 1914 there were 204 roll-calls on the last day. In the Illinois session of 1917 more than one half of the bills finally passed by the two houses were acted on within the last ten days of the session, although the General Assembly had been in session for

CHAP. VIII

more than five months prior to this time. In the Illinois legislative session of 1919 final action was taken in the period from June 4 to June 20 upon more than three fourths of all the laws enacted, although the legislature had been in session from January 8.

Last days of session

The last few days of the legislative session are crowded with a succession of roll-calls. The enactment of bills in undue haste is essential if the measures are to get through before adjournment. This situation presents itself not merely in the states that have sessions limited to a specified and small number of days, but also in states, like New York and Illinois, whose legislative sessions are unlimited. Legislative rules in many of these states seem to have been planned for the purpose of producing a great rush of business at the end of the session. In most of the legislatures the individual member is substantially in command of each step with respect to the bills that he has introduced, and a command by all members, without a rigid enforcement of rules is, in effect, no command, although in many legislatures steering committees are appointed toward the end of the session. Legislative calendars are ordinarily made up indicating the order in which bills are to be acted upon after they have been reported by committees; but these calendars are to a great extent disregarded. In many legislatures unanimous consent constitutes the chief rule of procedure. Unanimous consent in most cases means the consent of the speaker, for an individual member is ordinarily unwilling to object to the consideration of bills of other members out of order, for fear that other members may object to similar requests by himself. In some legislative bodies a great mass of bills is tabled toward the end of each legislative session, because nothing has been done with respect to them by the committees to which they were referred, or because the bills are in such a stage that there is not time for their consideration before adjournment is to take place.

Political considerations

Unless legislative rules are better adjusted, and some organized leadership is provided, a great mass of proposed legislation, much of which is just as meritorious as that enacted, is certain to fail because of lack of any consideration whatever. Important measures will receive some consideration, even though the majority of the members are opposed to them. But most bills are from a political standpoint of minor consequence—though, because of our policy of detailed legislation, they may be necessary or proper to meet particular legal difficulties. What happens to this type of proposed legislation depends to a large extent upon the political standing of the members who are urging it. The political standing of the members is not so material if the bill once comes to a roll-call; but bills presented by members who are not in the good graces of those in political control are often not permitted to come to this stage.

Avoidance of confusion

In Massachusetts, and perhaps to a less extent in Wisconsin, the confusion at the end of a legislative session is to a large extent avoided. In both states legislative bodies are unrestricted as to the length of their sessions; but so also are the legislatures of New York and Illinois, in which the confusion at the end of the session is particularly conspicuous. It may be worth while to compare the legislative rules of Illinois and Massachusetts, in order to see to what extent these rules actually aid in producing the differences between the two bodies.

Rules in Illinois

The legislative rules of the two houses in Illinois contribute to the end of the session rush in the following ways: (*a*) A committee to which a bill is referred may hold the bill without report as long as it sees fit, and may report the bill toward the end of the session. The failure of committees to report bills promptly often results from the attitude of the member who has introduced the bill; for in Illinois an idea has developed that bills have a better chance of passage in the confusion at the end of the legislative session. (*b*) After the committee has re-

CHAP. VIII

ported a bill, the member introducing it, or in charge of it, may not urge it to second reading or to a third reading and vote, either because of lack of interest or because of fear of the result. Sometimes mere absence of personal initiative is responsible for delay. Daily calendars are printed for each house, and in the senate they represent to some extent the actual order of consideration. But the house calendar merely gives a picture of the status of bills, without any real indication of the order in which they will actually come up for consideration. Under the rules, the individual member is in complete command of the bills that he introduces, except for the fact that the committees are in command until they report. However, the committees actually report upon bills at the time desired by influential members.

Rules in Massachusetts

In Massachusetts the rules are devised largely for the purpose of obtaining a prompt consideration of legislative measures. This is largely accomplished by the following rules: (*a*) Substantially all measures are introduced early in the session or are presented before the session begins.[1] This is in striking contrast with the Illinois situation, where, if the two houses are promptly organized, there is little or nothing for them to do during the first six weeks of the session, because few bills have been introduced. (*b*) Legislative rules require the committees to report before the second Wednesday in March on matters that have been referred to them before that date. This time may be extended for one month; but when the date for report has expired, all measures still in the hands of any committee must be reported within three days. This rule does not apply to appropriation bills.[2] (*c*) After report and second reading, bills go to

[1] Much the same result is sought in Wisconsin by making it substantially impossible to introduce bills after the fifth week of the legislative session; and in Nebraska by a rule prohibiting the introduction of bills after twenty days of the session.

[2] In some states the same purpose is sought by requiring that bills be reported within a limited time after they have been referred to a committee. But rules do not enforce themselves.

the committee on third reading of bills, and if not reported promptly from this committee a report may be forced. This committee ordinarily reports within two or three days, and if it desires to hold a bill longer it reports this fact. When reported upon by the committee on third reading of bills, the bill is voted upon in the house in which it is presented.

Massachusetts rules force orderly procedure

Thus in Massachusetts each step upon a bill is substantially forced after the preceding step has been taken. The legislative organization there is by no means perfect; indeed, Massachusetts is one of the states in which there is still a great abuse in the matter of laws of special application. But in respect to general procedure much can be learned by other states from the Massachusetts rules.[1]

System needed

A great deal may be accomplished in systematizing legislative work by a rule that the presiding officer of each house shall receive at the end of each week a complete report of the status of all legislative work, including a report from each committee as to the bills in its possession, with an indication of the dates when reports will be presented upon such bills. There have been developed in a number of the states weekly publications that present brief digests of all the bills introduced in the two houses, with an indication of the status of such bills. In Illinois and some other states the actual voting upon the final passage of many bills is determined by the statement in such a digest, because the members do not have the time to read the full text of all bills. A weekly publication of this character is a great aid to legislative members, and without it many legislative bodies would be without anything in the way of a guide as to the status of legislative work. But such a publication does not

[1] For defects in the Massachusetts legislative organization and procedure see *Report of the Joint Special Committee on Legislative Procedure* (Boston, January, 1915).

CHAP. VIII

take the place of a real organization within the legislative bodies themselves.

THE GOVERNOR'S SHARE IN LEGISLATION

Governor's veto

The governor has had an increasing share in legislation. He now has a veto power over legislation in all of the states except North Carolina; and the veto can, in most of the states, be overcome only by a two-thirds vote, although a three-fifths vote is required in some states; and a bare majority in others.[1] There has also been a definite increase of the governor's control over appropriations, through the vesting in him of a power to veto items in appropriation bills. Such a power now exists in about three fourths of the states. There has been a tendency in some states to extend the governor's veto power still farther. The Washington and South Carolina constitutions confer upon the governor the power to veto any item or section of a bill presented to him. Ohio, in 1903, conferred a similar power upon its governor, but this authority was withdrawn by constitutional amendment in 1912.[2]

Proposal of amendments by governor

The Alabama constitution of 1901 permits the governor to propose an amendment to remedy any feature of a bill which he does not approve, and if his proposed amendment is not adopted by the two houses, the bill, in order to become a law, must be passed over the executive veto. The Virginia constitution of 1902 gives the governor power to recommend the amendment of a bill if he approves its general purpose, but disapproves of any part thereof; the bill, if amended by the two houses, or

[1] The veto may be overcome by a majority of all members in Alabama, Arkansas, Indiana, Kentucky, New Jersey, Tennessee, and West Virginia. In studying specific constitutions it is important to bear in mind whether the majority required is one of all members elected or merely of those present.

[2] For a full review of the development of the Governor's veto power see N. H. Debel, *The Veto Power of the Governor of Illinois*, University of Illinois Studies in Social Sciences, Vol. VI, Nos. 1 and 2 (1917).

if they fail to amend it in accordance with the governor's recommendation, is again returned to the governor for his approval or disapproval. A Massachusetts constitutional amendment adopted in 1918 provides that "the governor, within five days after any bill or resolve shall have been laid before him, shall have the right to return it to the branch of the general court in which it originated, with the recommendation that any amendment or amendments specified by him be made therein. Such bill or resolve shall thereupon be before the general court and subject to amendment and reënactment. If such bill or resolve is reënacted in any form, it shall again be laid before the governor for his action, but he shall have no right to return the same a second time with a recommendation to amend."

Budget control

There has thus been a slight tendency to vest in the governor an affirmative control over legislation, as well as a negative control through the veto power. With respect to appropriations, constitutional amendments in Maryland and Massachusetts have still further increased the governor's control. Under the Maryland budget amendment of 1916, the governor submits the general state budget to the two houses of the legislature, and the legislative bodies have no authority to increase the items in the budget so proposed. However, the governor's veto power over items of appropriation was withdrawn by the same amendment. Under the Massachusetts budget amendment of 1918, the governor submits a proposed budget; but the general court (*i. e.*, legislature) of that state retains power to increase or otherwise change the items of the budget. However, the governor is given power to disapprove or reduce items or parts of items.

Veto power a negative control

In the main, the control over legislation vested by state constitutions in the governor is a negative control. The veto power is a power to prevent legislation, and does not involve a positive share in the legislation that is enacted. The effectiveness of the governor's veto power

CHAP. VIII

as a negative control over legislation is strengthened by the present practice of passing most of the legislation just before the end of a legislative session. If the two houses of the legislature pass most of their bills just before adjournment, the governor's veto power becomes an absolute veto, because the two houses do not again meet in order to overcome such a veto.

Governor's action after adjournment

In California, New York, and some other states, the governor is allowed thirty days within which to act upon proposed legislation, in order that he may, after the two houses have adjourned, sift out the various measures passed by the legislature and determine which measures he shall approve and which he shall disapprove. Sometimes legislative bodies have shifted the responsibility for final action to the governor by passing two laws upon the same subject, one prescribing a particular policy and the other prescribing the opposite policy, leaving the governor to make his choice.

Pocket veto

In many states the governor may exercise the so-called pocket veto, if return of a bill is prevented by adjournment of the legislative bodies. In these states inaction by the governor defeats a measure that comes to him after adjournment, though defeat of a measure by executive inaction is prevented during the session. The more common and better constitutional rule is that if the governor does not disapprove a bill within a certain time, it shall become law, whether the legislature is still in session or not. The employment of the pocket veto at any time is an evasion of the governor's responsibility. Without a pocket veto, however, the governor seeks to avoid full responsibility for many measures that become law after the legislative adjournment. He signs the measures that he fully approves; vetoes those that he disapproves; and does nothing as to a large mass of measures upon which he has no definite convictions, or as to which political influence is sufficient to prevent a veto. Although he seeks to assume no responsibility for

measures that become law through his inaction, he can not altogether avoid the responsibility. If action by the two legislative bodies is to mean anything, it should raise a presumption in favor of the measure they have passed, and affirmative executive action should be required to defeat such a measure.

Leadership in legislative bodies

Within the legislative bodies themselves there necessarily exists some degree of leadership. By virtue of his position, and of the fact that his consent in many states is substantially necessary for the prompt consideration of a measure, the speaker of the house occupies an important position. Upon his ability depends to a large extent the effectiveness with which the work of the house is done. Majority and minority leaders also constitute important elements in the leadership of legislative bodies, as do the chairmen of the more important committees. In a state senate, if the lieutenant-governor is the presiding officer, he does not ordinarily exercise much leadership. Sometimes the senate leadership rests in the majority and minority leaders, and sometimes in a small group of members who are perhaps also chairmen of important committees.

Executive leadership

When the governor and the two houses of a state legislature are in political agreement, as they usually are in most of the states, the governor has the opportunity to exercise a large degree of leadership in the work of legislation. The constitutions require him to send messages to the legislature, and he has also a large negative authority over the work of the two houses through the veto power. Through the approval of his appointments, state senates have some control over the governor in most states; and the two houses together must be relied upon to make appropriations desired by the executive department. Of course, in cases of grave abuse of executive authority the power of impeachment rests in the two houses. However, the governor is a single individual as contrasted with two large and somewhat unorganized

CHAP. VIII

groups, and has a large opportunity for leadership, through an appeal, if necessary, to the public sentiment of the state. By conference with leaders of the two houses, and by the intimation of possible vetoes, he may have a large degree of influence over the legislation to be enacted by the two houses. His power and leadership are apt to be greatest when they are established by close personal relationships, and upon the basis of mutual confidence rather than by threats or attempts at coercion.

Basis of executive leadership

One of the weaknesses in the leadership of governors is that in a large number of states they are elected for two-year terms, and are not in a position to be entirely familiar with the legislative problems to be dealt with. However, on the other hand, when a governor is elected for four years, and so deals with two biennial sessions of the legislature, his influence over the session at the beginning of his term is likely to be greater than at the session starting when his term is half over. A new governor not only has patronage to distribute, but he enjoys the prestige that comes from having just been elected. He has a position of party leadership, and may have had a large share in framing the party platform upon which both he and the legislative members have been elected. There is a saying in Illinois that the first session under a new administration is the "governor's session," and the second session the "members' session." The governor's influence in legislation chiefly rests upon a political basis. Party organizations are based almost entirely upon national issues, and party lines are only occasionally drawn in votes upon proposed legislation; yet the parties determine the organization of the two houses, and upon them largely depends the relationship between the legislature and the executive.

THE PLACE OF THE LEGISLATURE IN THE STATE GOVERNMENT

Legislature not a body of experts

Legislative bodies are fairly representative of the average intelligence of the people. Various types of trades and professions will usually be represented, though lawyers constitute in many cases the largest single group.[1] Many lawyers who are in the legislature are, however, at the same time successful politicians. State legislative bodies are not composed of experts, and it is doubtful whether they can or should be so constituted. The chief purpose of a legislative body is that of reflecting popular opinion upon matters of governmental policy, and this function can best be performed by a rather large group of persons whose relationship to the voter is close.

Legislation an amateur function

In most of the states legislative sessions are definitely limited by constitutional provision. A person who is elected to the legislature may be called upon to devote but sixty days out of each two years to the work of legislation. In states where legislative sessions are unlimited, as in Massachusetts with annual sessions, a member will give only a part of his time to legislative matters during about half of each year; and in states with biennial and unlimited sessions, as in Illinois, a member will give a part of his time to such matters for about six months out of each two years. In many states the practice has developed of having only a few days each week during the legislative session devoted to the actual work of legislation, the members of the two houses going to their homes over the week-ends. Members of legislative bodies do not and can not devote all of their time to legislative work; they must generally rely upon other occupations for their support. During long sessions of the

[1] For a further consideration of the membership of state legislatures, see an article by S. P. Orth, reprinted in P. S. Reinsch, *Readings on American State Government*, pp. 41-56; and George H. Haynes, "Representation in State Legislatures," *Annals American Academy of Political and Social Science*, XV, 204-235, 405-425; XVI, 93-119, 243-272 (1900).

CHAP. VIII

legislature, they must maintain some relationship with their private occupations. As it is organized in the American states, the task of legislation is therefore an amateur function. No man can become an expert upon all of the problems to be dealt with in a legislative session, and also devote the greater amount of his time to his private business. Many individual members are, of course, elected for successive terms, and develop a high degree of expertness in the procedure of legislation;[1] and some of the tasks of legislative bodies, such as that relating to appropriations, may obtain continuity and expertness of rather a high character. However, the measures coming before one session of a legislative body vary materially from those coming before the next session, and continuity of service does not necessarily give much of expertness in dealing with the new problems as they arise.

Legislatures temporary bodies

The task of state legislatures is chiefly that of appropriating for the support of state government, passing laws providing revenue to meet such appropriations, and legislating with respect to problems that present themselves in connection with state and local administration. The state executive department is the chief body to which appropriations are made; and it is the body that administers the appropriations after they are made. The state and local administrative organizations are continuously in existence, and must administer the laws enacted by the state legislatures. State legislatures may, therefore, be termed temporary bodies of popular representatives, legislating for a permanent state and local administrative organization. The problems of appropriations and of state and local administration are highly complex and difficult, and state legislatures ordinarily come into session without any carefully worked out policy as to what legislation is desired in these respects.

[1] For a table indicating service of members in successive legislative sessions, see *Massachusetts Constitutional Convention Bulletins*, I, 369.

Appropriation policy

During the past few years there has been an effort to work out a policy as to state appropriations, in advance of the meeting of legislative bodies. The preparation of a proposed state budget has generally been vested in the governor, as the head of the executive department, which is chiefly to be charged with the expenditure of the moneys appropriated. Constitutional amendments in Maryland, Massachusetts, and Nebraska have sought to give the governor a definite command with respect to this portion of legislative work. A constitutional amendment in West Virginia constitutes the governor and the other elective state officers a board for the presentation of a budgetary plan to each session of the legislature; but it is defective in that it does not give control to the governor. Some states have sought to work out an appropriation policy through permanent organizations under the control of the legislature itself. But, so far as appropriations are concerned, plans have been adopted in a number of states under which the governor shall work out, in advance of the meeting of the legislative body, a definite program for its consideration.

Need for policy in legislation

No similar plan has yet been devised by which the governor shall plan a program of proposed legislation on matters relating to state and local administration, for submission to legislative bodies when they meet. The careful working out of such a program in advance of the meeting of the two houses would in no way be a usurpation of, or an attempt to usurp, legislative powers upon the part of an executive, but would result in making the legislative department more effective, because giving it a definite program, which it might adopt, alter, or reject. The work of legislation in the states is largely haphazard and purposeless, and this very fact is responsible for the disrespect in which legislative bodies are held by a large part of the population.

Legislation a hazardous occupation

Under the conditions imposed by state constitutions, legislation may be termed a hazardous occupation; for

CHAP. VIII

the numerous limitations upon legislative powers and procedure make it extremely difficult to enact laws without conflict with the constitution. The organization of legislative bodies is highly complex and cumbersome, and it is remarkable that they should be as efficient as they have been. Not only are there numerous constitutional hazards in the task of legislation, but many of the clauses of state constitutions have been given no definite meaning through judicial interpretation. Legislatures often incur a serious risk in passing laws, although acting with full knowledge of all decisions of the courts of their states; for the courts may, by a change of attitude or by a decision upon a new question, hold legislation unconstitutional, although great care has been exercised both in its preparation and in its enactment. The steps of legislation are so complex that the successful passage of an act requires constant watchfulness. This does not mean that there is too little legislation or that it is now too difficult to obtain the passage of laws; but it has meant, to those desiring to obtain or defeat legislation, the necessity of developing outside of the legislative body a group of experts who will see that the proper steps are taken or omitted. Here the complexity in legislative processes has built up an expert group outside of, and not responsible to, the legislature, just as the complexity of the citizen's task in voting has built up a party organization to do his work for him.

Criticism of legislature

State legislative bodies are not so bad as they are reputed to be; and in many states they perform their functions no less satisfactorily than other departments of government. Legislatures are naturally the organs that receive blame for the failures of popular government, for they are the policy-determining agencies of the state. They are blamed both for the laws they pass and the laws they fail to pass. Those interested in proposed legislation blame legislative inaction, even though the proposal may have had little popular support. Criti-

cisms cumulate upon the legislature; and other organs of government can always, without fear of contradiction, put the blame for their failures upon the legislature. The legislature is not blameless; but many of its failures are due to a cumbersome organization and procedure, and to complex constitutional restrictions which hedge it about on every side. Much may be accomplished toward restoring the confidence of the people in the legislatures by a simplification of their organization, and by a plan under which a program of proposed legislation may be submitted to each legislative session. Criticism of legislatures can, and should, cease only when everybody is satisfied with the laws they enact; for criticism is one of the most effective forces in popular government. To be thoroughly effective, criticism should, however, be intelligent.

Representation is sectional

Legislative bodies in this country are organized upon the plan of representing local areas. Each member comes from a local district and is a resident of that district; although several members may often be elected from the same district. In order to obtain reëlection the member must look after the interests of his district, so far as they are likely to be affected by proposed legislation. The state legislature is therefore, to a large extent, not a representative of the people of the whole state, but rather a group of persons each of whom represents a specific portion of the state. This situation in itself makes difficulty and has been partially responsible for the increased power over legislation granted by the constitutions to the governor. The governor is elected by all of the people of the state, and has come to be regarded as in many ways more distinctly a representative of the state as a whole than are the members of the two houses of the legislature. It is desirable that there should be representation of the different local interests throughout the state by members chosen from districts. It is at the same time desirable and necessary, from the point of

CHAP. VIII

view of legislative efficiency, that there shall be some influence, such as that of the governor, which represents the state as a whole, and also something in the nature of a permanent organization to prepare a definite program for the approval or disapproval of the legislature.

Possible types of legislative organization

In organizing the state legislative department, three possibilities present themselves:

(1) The establishment of a permanent technical legislature controlled by the referendum. This plan shifts the responsibility for much of legislative detail to popular action, and would enormously increase the already too great amount of popular voting.

(2) The maintenance of a large [1] and popularly representative body, with a simplified organization and procedure, to be in session only part of the time, but with a permanent technical staff built up under the control of the legislative body itself. Such a plan has been attempted in New York and other states with respect to the development of a budgetary policy; but it has not worked satisfactorily. To some extent, legislatures now use machinery of a more permanent character, by appointing committees to report at a succeeding session upon important matters, or by the creation of commissions for the same purpose. Legislative reference bureaus have been established in the greater number of the states, and in some instances are under the control of boards having legislative members. Such bureaus have aided materially in improving the form of legislation in some states; but they have little if any influence upon the larger policies to be dealt with through legislative action. Not only this, but under the present organization of legislatures little bill-drafting is done by legislative reference bureaus until after the legislature is in session. The members of legislatures have, before coming into session, devoted their attention primarily

[1] But not so large as in New Hampshire.

to their private affairs, and it is not until they actually come to the definite task of legislating that they begin to think about the measures they may desire to introduce. The work of legislative reference bureaus has therefore, in the main, been a task of drafting a great mass of bills within a relatively limited time. Of course the bureaus, if wisely administered during the intervals between legislative sessions, have devoted themselves to work upon problems likely to arise, and have made some preparation to meet legislative problems before they present themselves; but, on the whole, little has been accomplished in this respect.[1]

(3) The third possibility is that of a large legislative body, with simplified organization and procedure, and with a responsibility in the permanent executive organization for the preparation and submission of a proposed legislative program; leaving, of course, to the large representative legislative body full control of what shall be done with such a program.

Legislative work may be simplified

Of course, much can be accomplished toward simplifying the legislative task by reducing the details of legislation. Before 1850, and in many states long after that date, a large part of the time of legislatures was devoted to the passing of local and special legislation. Much of this legislation related to chartering private corporations and to granting or altering charters of the various local governing bodies within the state. With the prohibitions upon local and special legislation, this type of legislative work has disappeared in most of the states. It has proved relatively easy to handle the whole problem of chartering private corporations by passing a general law laying down the principles of state policy, and vesting in an administrative body the actual issuance of charters largely in the form in which they are drawn by those desiring to organize a corporation.

[1] For a full statement regarding these bureaus, see *Report of the American Bar Association*, 1913, pp. 636-660.

CHAP. VIII

Grant of broader powers to local governments

After local and special legislation for municipal bodies was prohibited, great difficulty arose because of the fact that cities of different sizes have different problems. This situation has to some extent been solved by municipal home rule, and, in states not having municipal home rule, by giving to cities a large degree of freedom under state law as to the details of their local organization. In the states that have municipal home rule, cities have been given substantially complete power to frame their own charters, although without the establishment of a general state policy such as is maintained with respect to the chartering of private corporations. For private corporations the states lay down more definite rules as to form of organization than do the home rule states as to the form of organization of cities. The policy of the states with respect to municipal powers has been, in all but a few cases, that such powers should be granted in great detail, thus making necessary new legislation every time municipal bodies desire to exercise new powers. This situation has been met in some states by express constitutional grants of local powers to municipal bodies; and it may be met in others, without constitutional change, by altering the present policy of the relationship between state legislation and local powers. A state may grant powers to local communities in broad language, leaving to the legislature an authority to limit such local powers if they result in abuse. Such a plan would relieve the legislature of much detailed work, with which it can never adequately deal.

Rate-making function no longer exercised by legislatures

The regulation of the rates of railroads and other public utilities is still, in legal theory, distinctly a legislative matter; but in substantially all of the states the power to regulate rates in detail has been vested in administrative bodies, subject to general rules of policy laid down by legislative action, and subject further to a judicial review as to the reasonableness of the rates so determined upon. In the state of Arizona the constitu-

tion itself expressly sets up an administrative body and grants to this body power over the rates of public utilities. Some states have expressly granted to their courts large power to make rules as to judicial procedure.

Delegation of legislative power

The American principle of separation of powers has led to a strict rule in this country against the delegation of legislative powers. This rule does not prohibit the state legislatures from granting powers of subordinate legislation to local governments, and such powers have been extensively granted. The judicial decisions upon the principle of the delegation of legislative powers are in many respect unsatisfactory; but they may be resolved into the statement that the legislature is the body for the determination of general policy. If the legislature determines the general policy, it may vest in administrative bodies the making of rules for the detailed carrying out of that policy. Through the grant of a rule-making power to administrative bodies, under a general policy laid down by legislative authority, we have begun to redraw the practical lines of separation between the executive and the legislative departments. Legislation has tended to go into great detail and to regulate every possible situation that might arise. Detail in legislation breeds further detail; and the legislative bodies, even though meeting at frequent intervals, can by no means determine all of the issues that are likely to arise in the application of legislation. Even if they could determine all such issues, they have neither the information nor the opportunity to deal with them wisely.

Illustrations of administrative rule-making power

The increased grant of subordinate powers of legislation to administrative bodies is therefore likely to be one of the great developments of the future in state government. In the field of labor legislation, a number of states [1] have by legislation merely announced a general policy, and have vested in the bodies administering the

[1] New York, Ohio, Pennsylvania, and Wisconsin are the most important of these.

CHAP. VIII

labor laws a wide power to adopt more detailed regulations. This is also true with respect to sanitary codes. Legislation in New York authorizes the state health authorities to enact a sanitary code. One of the most striking recent illustrations of this tendency to vest large powers of subordinate legislation in administrative bodies is presented by a recent enactment of the Washington legislature. The administrative code enacted in Washington in 1921 creates a state fisheries board and authorizes it to make rules and regulations: (1) "fixing the time when the taking of the several classes of and all food fish is prohibited; (2) specifying and defining the places and waters in which the taking of the several classes of and all food fish is prohibited; (3) defining, fixing, and prescribing the kind of gear, appliances, or other means that may be used in taking the several classes of food fish, and the times, places, and manner of using the same." All laws relating to these matters were to remain in force until altered by rules and regulations of the state fisheries board.

Rule-making not a reduction of legislative power

Courts are coming to a liberal view with respect to legislative grants of rule-making power, if the power so granted is carefully safeguarded and may not be exercised arbitrarily. Probably two thirds of the present detail of legislative work can now be shifted without constitutional difficulty. Constitutional changes aid this movement by vesting in the courts power to regulate their own procedure. But the legislature should remain the state's policy-determining organ, and should have power to supersede, if necessary, the rules made by other bodies. This may be accomplished through a provision that such rules shall be submitted to the legislative body, and shall become ineffective upon the enactment of contradictory legislation. Through the development of a large degree of rule-making power in other bodies, legislatures may relieve themselves of a great mass of detail with which they can never adequately deal, and yet pre-

serve complete control over the determination of state policy.

Organization of the rule-making power

A large degree of rule-making power is now exercised by the courts and by the state administration. But this power is exercised by various independent offices and courts, without adequate organization or supervision. If the courts are to exercise the power to determine their own procedure, the judicial organization itself must be so constituted as to exercise this power wisely. The power can not be exercised wisely by each court as a separate unit, or if in each court every judge may make his own rules. In the state executive organization, the final power to issue rules should rest in the head of the executive upon the recommendation of the department concerned, and there should be some permanent agency to coördinate these rules and prevent conflicts. Rules supplementing statutes should be as easily known to the people of the state as are the statutes themselves. An unrestricted vesting of rule-making power in independent bodies will cripple the true function of the legislature.

Functions not resulting in passage of laws

Appropriations are, of course, made in the form of laws, though they involve some problems not parallel with those of other types of legislation. State senates have in many states a power of approving certain of the governor's appointments, though in Maine, Massachusetts, and New Hampshire this power is vested in the governor's council. In some states judges are removable by legislative action, or by the joint action of the governor and legislature, a two-thirds or a three-fourths vote of the legislature being ordinarily required. State constitutions (except in Oregon) provide for the impeachment of the governor and other civil officers (including judges) by legislative action. Impeachment charges are brought by the house of representatives and tried by the senate; though in Nebraska charges are presented by the two houses in joint session and the trial is

in the supreme court, unless a judge of that court is impeached. In New York the judges of the court of appeals sit with the senate to form a court of impeachment. The Oregon constitution expressly forbids the use of impeachment, and provides that "incompetency, corruption, malfeasance, or delinquency in office may be tried in the same manner as criminal offenses." Legislatures infrequently employ their powers to remove judges or to impeach state officers. These powers are conferred in such a manner that they may be used only on extraordinary occasions.[1]

[1] See "The Removal of Judges in Massachusetts," *Bulletins for the Massachusetts Constitutional Convention*, 1917-18, Vol. II, p. 539.

NOTE TO CHAPTERS VII AND VIII

Upon the subject of apportionment, perhaps the best discussion is that in Reed's *Territorial Basis of Government under the State Constitutions*. Elmer C. Griffith's *Rise and Development of the Gerrymander* (Chicago, 1907) is of interest; as is also C. O. Sauer, "Geography and the Gerrymander," *Amer. Pol. Sci. Rev.*, XII, 403-426 (1918). Any one who desires to understand the difficulties of making a legislative apportionment will find it an interesting exercise to make an apportionment for his own state. The census statistics and the rules of the state constitution are sufficient for such an exercise. An analysis of census statistics will readily disclose the existence or non-existence of sectional representation in a particular state. There is opportunity for a study of the development of the constitutional rule that a legislator shall reside in the district from which he is elected.

Election statistics are available in most states, through which it may be discovered what proportion of voters is actually represented by a majority of the members of the two houses. Dr. Blaine F. Moore has analyzed the results in Illinois under the cumulative system.

Upon the issue as to whether the states should continue to have a bicameral legislature, little can be gained from experience in the states. It will be of value to have for each state studies such as Dr. Colvin has made for New York. The experience of Vermont with a single-chambered legislature should also be the subject of thorough study.

Legislative procedure in each state should be studied. Dr. Dodds has presented an outline in a general study. For Iowa a thorough study will be found in *Statute Law-Making in Iowa*, edited by Benjamin F. Shambaugh and published as Volume III of the Iowa Applied History Series. For most of the states the legislative rules are easily obtainable, as are also lists of members, with sketches of their lives. For Vermont and Massachusetts reports of committees on legislative procedure have been published in 1916 and 1915 respectively. The

Nebraska Legislative Reference Bureau in 1914 published an interesting analysis of legislative procedure in the forty-eight states.

No person can obtain full knowledge of procedure in forty-eight state legislatures. A student may learn something of the procedure in his own state, and of its relationship to better methods in other states. The influence of the speaker varies, as does also that of the governor. In some states a committee on rules is important, and not in others. Rules of committee procedure are important, for much of the work is actually done in committee. The form in which bills are printed has a direct bearing upon the ease with which legislators perform their duties. In some states weekly cumulative digests are published, indicating at frequent intervals the status of all proposed legislation.

The product of each session of a state legislature needs to be studied. Franklin Hichborn's stories of a series of California legislative sessions are of interest in this connection. What effect on the product of a session has the split legislative session or the limitation upon time for introducing bills? Students of government should know the extent of special legislation in their states; or if special legislation is forbidden, the amount of legislation general in form but in reality special.

Debel's study of the veto power in Illinois is a good basis for similar studies in other states. In a number of states veto messages of the governor are available in pamphlet form. Governors' messages to state legislatures are of value. Frequent summaries of such messages appear in the *American Political Science Review*. The citizen of a particular state should know what his governor is recommending. It would be of value for each state to have studies of the influence of governors' messages and of party platforms upon legislation.

The influence of the lobby in each state should be studied. Legislation is often the product of agreements outside of legislative halls. Is this undesirable, and if so can it be prevented? To what extent can the lobby be regulated? To what extent are "jokers" placed in legislation without the knowledge of those supporting legislation; and to what extent are provisions weakening the purpose of proposed legislation inserted advisedly, with the support of majorities of legislative bodies? These and numerous other questions can be answered concretely by following the fate of specific measures in the legislative body.

The technical aspects of legislation may be studied in Professor Ernst Freund, *Standards of American Legislation* (Chicago, 1917); and in Chester Lloyd Jones, *Statute Law-Making in the United States* (Boston, 1912). The technical problems are outlined in a report of a committee on bill-drafting to the American Bar Association in 1921. In a number of states pamphlets have been issued by official authority outlining the constitutional requirements in drafting and passing legislation. The best of these pamphlets is *Notes on Bill-Drafting in Illinois,* issued by the Illinois Legislative Reference Bureau in 1920. In connection with bill-drafting, the work of legislative reference bureaus in particular states should be studied. Such bureaus have exercised great influence in certain states, but their importance has varied with political conditions. The method of revising the statutes in each state should be studied. An outline of the problems and of their solution in the more important states will be found in a pamphlet on *Statutory Revision in Illinois,* issued by the Illinois Legislative Reference Bureau in 1918.

Upon the delegation of subordinate rule-making power to the executive department, reference should be made to English experience, which is discussed in Chapter XIX of Lowell, *Government of England.* A fuller discussion will be found in a recent book by Cecil Carr on *Delegated Legislation.* But knowledge of the experience of other countries is not so important as information regarding the use of such power in the states. A thorough study of this subject is needed. For the national system, the subject may be studied in John A. Fairlie, "Administrative Legislation," *Michigan Law Review,* XVIII, 181-200 (1920).

The non-legislative functions of legislative bodies should receive more attention than they have yet had. Of what value is senate confirmation of executive appointments? What is likely to result from the recent Nebraska experiment of giving this power to both houses? How does legislative confirmation compare with that of executive councils in several of the New England states? We do not now have a basis for answering any of these questions; nor do we know much about the operation of impeachments, or of constitutional methods for legislative removal of judges. For the study of impeachments the Sulzer case in New York and the Ferguson case in Texas present recent examples.

CHAPTER IX

DEVELOPMENT OF THE STATE EXECUTIVE[1]

Governorship becomes an independent office

IN the first state constitutions the executive department was subordinate to the legislature. The governor and certain other state officers were chosen by the legislature, and an executive council, also chosen by the legislature, was substantially placed on guard to prevent executive usurpation. Such an attitude toward the governor was natural in 1776; but the governor's power almost immediately began to grow. New York in 1777 made its governor popularly elective. Massachusetts (1780) and New Hampshire (1784) soon followed, though these states at first required a majority to elect, and placed the final choice in the legislature itself in case no candidate had a majority.[2] Executive councils soon began to disappear, and now remain only in Massachusetts, Maine, and New Hampshire.[3]

Election of governor

In all states the governor became a popularly elected officer, and hence independent of legislative dominance. In only one state to-day is the governor not directly elected by popular vote. In Mississippi a popular election is held for governor, and the "person receiving in any county or such legislative district the highest number of votes cast therein, for said office, shall be holden to have received as many votes as such county or district is entitled to members in the House of Representatives,

[1] Upon the subject matter of this chapter see Finley and Sanderson, *The American Executive and Executive Methods* (New York, 1908), and J. A. Fairlie, "The State Governor," *Michigan Law Review*, X, 370-383, 458-475 (1912).

[2] For difficulties caused by this requirement, see Reinsch, *American Legislatures and Legislative Methods*, pp. 220-222.

[3] See *Massachusetts Constitutional Convention Bulletins*, 1917-18, I, 109 (Bulletin No. 3, "The Abolition of the Governor's Council"). The elective state officers in North Carolina are termed a council of state, but have few powers as such.

CHAP. IX

which last named votes are hereby designated 'electoral votes.'" To be elected, a candidate must receive a majority of both the popular vote and the electoral vote; otherwise the house of representatives chooses a governor from the two who have received the highest popular votes. This plan was adopted for the same racial reasons that dictated a representative system in Mississippi upon a sectional basis.

Other state executive officers

Other state officers became popularly elective, though some such officers are still chosen by state legislatures.[1] Until about fifty years ago, the functions of state government were few, and were chiefly conducted by a small group of popularly elected officers. As new needs have developed, the constitution itself has provided for new offices, which have usually been filled by popular election. Illinois has six such officers in addition to the governor; Idaho and Nebraska, seven each. In addition, in the latter two states, and in a number of others, various offices, boards, and commissions are expressly provided by the constitutions.

Plural state executive

The governor is but one of a group of officers constituting the state executive department. New Hampshire, New Jersey, Maine, and Tennessee are the only states that do not have other popularly elected state executive officers; and in all of these states certain constitutional officers are elected by the legislatures, and are therefore independent of the governor. Thus in Tennessee the treasurer, secretary of state, and comptroller are chosen by the legislature. Among the state executive offices independent of the governor, the chief positions are: lieutenant-governor; secretary of state; superintendent of public instruction; attorney-general; treasurer; and auditor or comptroller. Each of these offices must be discussed briefly.[2]

[1] For a list of such officers see note on p. 204.

[2] For fuller statements, see Mathews, *Principles of American State Administration*, Chap. VI; and *Illinois Constitutional Convention Bulletins*, 687-695.

Thirty-five states provide for the election of a lieutenant-governor. In all of these states except Massachusetts the lieutenant-governor presides over the senate, and in most of them he has a vote in case of a tie. In several states he may debate in committee of the whole; in Indiana, Kentucky, and Texas he may vote in committee of the whole. As a presiding officer forced upon the senate by constitutional provision, the lieutenant-governor has little power. Political powers that might otherwise vest in a president of the senate are exercised by a president *pro tempore,* chosen by the senate itself, or by committees or other agencies directly under the control of the senate. Where the office exists, the chief function of the lieutenant-governor is to succeed to the governorship in case of a vacancy, though in a number of states he acts in the temporary absence of the governor as well. Vermont seeks to dignify the office by providing that its occupant shall be lieutenant-general of all the forces of the state; but the added dignity is of doubtful value. In Massachusetts some political dignity is added by the membership of the lieutenant-governor in the council, and by the more important practice that the lieutenant-governor shall have the first claim to his party's next nomination for the governorship. In states that have a lieutenant-governor, constitutions usually provide for a succession to the governorship if the lieutenant-governorship should be vacant. The next in order of succession is most commonly the president *pro tempore* of the senate. States not having a lieutenant-governor also prescribe an order of succession, the first in order in this case usually being the president of the senate.[1] The office of lieutenant-governor is of little value and could be abolished without loss. The person chosen lieutenant-governor is usually not one whom the voters of the state would desire to have as governor; and

[1] For constitutional provisions bearing upon these matters see New York *Index-Digest of State Constitutions,* pp. 736, 921, 960.

CHAP. IX

this condition is not likely to change. The preferable plan is that of having the immediate succession in some one of the important officers appointed by the governor.

Secretary of state

The office of secretary of state, or secretary of the commonwealth, is found in all of the states. In five states he is appointed by the governor with the consent of the Senate.[1] In Maine, New Hampshire, and Tennessee he is chosen by the joint action of the two houses. In all other states he is elected by popular vote. Few duties are conferred upon the secretary of state by the constitution, and in most states his duties are such as are prescribed by law. He is the keeper of the state's public records and is frequently custodian of the state capitol. The important duties conferred upon him by statute usually relate to elections, corporations, and motor-vehicles. The laws of many states make him the chief officer with respect to the state's supervision of elections. Certificates of incorporation are usually issued by the secretary of state; and he is in most cases charged with the administration of so-called "blue sky" laws regulating the sale of securities. He is also frequently charged with the issuance of motor-vehicle licenses. The office of secretary of state has thus come to have important duties; although many of these duties have no relation to each other, and most of them involve little discretion.

Superintendent of public instruction

With the development of public education, each state has come to have a superintendent of public instruction or an officer with somewhat different title but similar duties. In the earlier development of the public-school system, the secretary of state in some cases was *ex officio* superintendent of public instruction; and the governor of Oregon was required to act as superintendent for the first five years under the constitution of 1857. Most of the state constitutions expressly create the office as an independent one, though leaving its functions and powers to be determined by legislation. In states whose consti-

[1] Delaware, Maryland, New Jersey, Pennsylvania, Texas.

tutions do not create the office, it is of course entirely the creature of statute. Superintendents are elected by popular vote in thirty-three states; in seven they are appointed by the governor, and in eight by state boards of education. Some constitutions create state boards of education. The powers and duties of the state superintendent vary in the several states, but there has been a definite tendency to extend state supervision over the local administration of schools.[1]

Attorney-general

The office of attorney-general exists in all states. In New Jersey, New Hampshire, and Pennsylvania the attorney-general is appointed by the governor; in Maine he is chosen by joint vote of the two houses; and in Tennessee he is selected by the judges of the supreme court. Elsewhere the position is filled by popular election. The powers of the attorney-general are mainly prescribed by statute. He acts as the chief law officer and legal adviser of the state government, and in some states has a fair degree of supervision over locally elected prosecuting officers. But, even as to the central state government, he is often but one of a number of independent legal advisers; for offices, boards, and commissions frequently have their separate legal advisers. By judicial decision in Illinois, all of the legal work of the state government is in the hands of the attorney-general; and by statute or official practice the same situation exists in some other states.

Treasurer

Each of the states has a treasurer. Treasurers are chosen by the legislatures of Maine, Maryland, New Hampshire, New Jersey, and Tennessee; but in all other states they are elected by popular vote. In some states this official is chosen for a shorter term than the governor. The treasurer receives state revenues and disburses appropriations from state funds. His functions involve little discretion, except with respect to the de-

[1] For a fuller statement regarding the superintendent, see Mathews, *Principles of State Administration*, pp. 307-319.

CHAP. IX

posit of state funds in banks. His financial transactions are ordinarily checked in detail by the auditor or comptroller.

Auditor

All but three of the states have an auditor or comptroller. In Oregon and Wisconsin the secretary of state is *ex-officio* auditor. The auditor is popularly elected in all states except New Jersey, Tennessee, and Virginia, where election is by joint vote of the two houses. The auditor acts primarily as a check upon the state treasurer, and his functions are the more important of the two.

Independence of financial offices

It has always been assumed that the auditor and treasurer should be independent of the governor, because of the fact that the governor is the head of the chief spending department of the government. Their selection is now in all cases independent of the governor; and the theory is often advanced that they are primarily agents of the legislative department, or of the people, to control the state's financial methods. The auditor has in a number of states been given power by legislative action to require uniform methods of accounting in departments of state government, and has frequently been vested with supervision over the accounts of local governing bodies. The auditor's functions relate chiefly, however, to the question whether money is being *lawfully* expended. The governor, as the head of a state administration, is chiefly interested in knowing whether money is being *wisely* spent, and whether departments will live within the appropriations made to them. The legislature and the people are equally interested in the answers to both questions. State financial control must to a large extent be in the hands of the governor, in order that he may meet his responsibility for efficient administration; and by statutes the governor has been granted an increasing power of financial supervision, without interfering with the powers of an independent auditor to determine the lawfulness of each proposed expenditure. In fact, the

constitutions of Arizona, Montana, and Wyoming expressly provide for a state examiner, to be appointed by the governor with the approval of the senate, for the purpose of examining financial accounts. Having provided an independent auditor to check the governor, they then put under the governor's control a state examiner to check the same accounts. In Virginia an auditing committee appointed by the legislature reports to the governor.

Relation of governor to other state executive officers

There has been some tendency to reduce the number of elective state officers and to vest a wider appointing power in the governor. For example, Ohio has removed from its list of elective state officials the public works commissioner, dairy and food commissioner, and state commissioner of common schools, replacing the latter by a superintendent of public instruction appointed by the governor. Yet little has been accomplished toward giving the governor complete supervision over the state executive department. He has, it is true, a limited constitutional authority over other elected state officers. In Michigan he may remove them for certain causes, reporting to the legislature at its next session. A number of constitutions authorize him to fill vacancies. He is authorized also to require reports from other elective state officers, though this power amounts to little, for he can not effectively compel obedience to his commands. If he seeks to press his constitutional powers, serious political difficulties may result, because the officers with whom he is dealing are elected by popular vote and have a political influence which he can not ignore. No powers of the governor are of avail when he seeks legal advice from an independently elected attorney-general, who may hope to further his own political ambitions by the opinions he presents upon questions of public interest. Naturally, close personal relationships do not usually exist between the governor and the other elected state officers.

CHAP. IX

Legal relations

In some cases constitutions expressly vest in the governor supervision over other elective state officers.[1] Legally these officers are in such an independent position that, if they decline to act, the governor's remedy is to apply to the courts to compel action, in the same manner as a private individual may do.[2]

Official relations

Constitutional provisions unite in various ways certain of the elective state officers. North Carolina makes four elective officers a council of state to advise the governor on certain matters. West Virginia unites the other elective state officers with the governor for the preparation of a state budget. Constitutions create numerous *ex-officio* boards, of which elective state officers are members; and the number of such boards has been multiplied by state legislation.

Governor the chief executive officer

Although state constitutions create a plural executive, most of them at the same time declare that the "supreme executive power" is vested in the governor. Constitutions also in most cases provide that the governor shall take care that the laws be faithfully executed, although this is generally held to confer no power upon the governor beyond that found in express provisions of the constitution or in valid laws enacted under the terms of that instrument.[3] By express constitutional provisions, the governor is, however, given a number of powers not vested in other elective state officers; and he has naturally come to be the real, as well as the titular, head of the state executive department.

Constitutional powers of governor

Through the development of the veto power, the governor has acquired great influence in the field of legislation. He also has power to recommend legislation, to call special sessions, and to adjourn the legislature under certain conditions. He is also, by express consti-

[1] State *ex rel.* Haskell *v.* Huston, 21 Okla. 782 (1908), and cases there cited.

[2] State *ex rel.* Fleming *v.* Crawford, 28 Fla. 441 (1891).

[3] For a discussion of the governor's powers, see Henry *v.* State, 87 Miss. 1 (1905).

tutional provision, commander-in-chief of the military and naval forces of the state. In most states he has power to grant pardons, reprieves, and commutations; though in some he is but one member of a board created for this purpose. In short, state constitutions give the governor a superior position in the state executive organization. Yet his increased importance is due quite as much to legislative acts as to the provisions of constitutions.

Legislative power to create additional offices

The number of constitutional state officers who are popularly elective can not be multiplied to an indefinite extent; and the increased importance of such officers has in recent years come chiefly through the vesting of additional powers and duties in them by statute. It would have been possible to build up the complete state administration around the governor and the other elective officers in the several states by vesting in the governor, or in some one of the other elective officers, all of the additional powers or functions that the legislatures desired should be exercised by the state government. Such a plan was actually contemplated by the Arkansas constitution of 1874, which provides that "the General Assembly shall have no power to create any permanent state office not expressly provided for in this constitution"; and by the provision of the Nebraska constitution of 1875 that "no other executive state office shall be continued or created, and the duties now devolving upon officers not provided for by this constitution shall be performed by the officers herein created." Neither of these provisions, however, operated to prevent the creation of offices other than those provided for by the constitution; and in 1920 Nebraska changed its constitutional provision so as to prohibit the creation of other state executive offices except by a two-thirds majority of all members elected to the two houses of the legislature.

Creation of additional offices

Aside from the constitutional provisions of Nebraska and Arkansas, no effort has been made to limit the legis-

CHAP. IX

lative power to create new offices. As new needs for state governmental activity have developed, additional powers have been conferred upon elective state officers, or new offices have been created by statute. In a number of states the constitutions expressly deny an appointing power to the legislature. Some constitutions expressly provide for a certain amount of appointing power in the governor, by and with the advice and consent of the senate; although the legislatures in many states are free to vest an appointing power in the governor either with or without the advice and consent of the senate, or to provide for some other method of appointing to office. When new offices have been created by statute, however, the natural tendency has been to vest the power to fill such offices in the governor, usually with the approval of the senate. Ordinarily, either by constitutional or statutory provision, the governor has power to remove the officers whom he appoints, although in many cases this power of removal is a limited one. With the rapid increase in the number of things that the state government undertakes to do, there has thus been an increase in the powers vested in the office of governor, and at the same time an increase in the importance of the office.

Independent office created for each new need

As needs for new state activities have presented themselves, the legislatures have usually created a new and independent office for the purpose of meeting each new need. The experience of Illinois in the creation of offices for the handling of labor problems will clearly illustrate this. The first specific need that presented itself was for a body to collect information about labor matters, and such a body was established in 1879. With the increased development of large-scale production in factories, there came a need for legislation protecting workers in such establishments; and upon the enactment of such legislation a factory inspector's office was created in 1893. The great Pullman strike of 1894 led to the creation of a state board of arbitration in 1895. With

the development of the need for regulation of private employment agencies, and of regulations for the inspection of mines, powers in these respects were for a while vested in the body established in 1879 for the collection of information regarding labor matters; but this was not in line with the general tendency, and soon independent bodies were created for the inspection of private employment agencies and for the administration of state mining legislation. For a while, when workmen's compensation legislation was first enacted, the administration of this legislation was vested in an existing body. But at the next session of the General Assembly a new body, the industrial board, was created for the administration of this legislation. Free employment offices began to be established in 1899. The offices established in each separate city were made substantially independent, and several offices established in Chicago were also substantially independent of each other; although all reported to a common central board.

Overlapping powers

These several bodies for the administration of labor laws in Illinois were created at different times, and naturally had conflicting and overlapping powers. Accidents were required to be reported to one or more of at least five separate organizations within the state government. No employer was sure whether he must report to one, two, three, or more bodies; or could be certain as to when he had complied with the law on this subject. Each type of accident report was definitely specified by statute, and when an employer had to report to two or more bodies, he was required to make a different type of report to each. The natural result was that in most cases the employer simply disregarded all of the laws with respect to accident reporting; and the confused relationships among the several state authorities prevented any one of them from detecting his violation of the law.

Number of separate offices

In each field of state activity, in Illinois and in other states, a similar development took place; until a state

CHAP. IX

was "poor indeed" that did not have 50 or more independent boards, offices, and commissions with conflicting powers and jurisdictions. Illinois before 1917 had more than 100 such bodies; Michigan in 1920 had 116; Delaware more than 100; New York 187; Massachusetts over 200; Maryland 85; Utah 48. In Michigan in 1920 the governor was *ex officio* a member of 24 boards. In this development of independent bodies, the states created boards whose members had overlapping terms, so that no one governor could ordinarily appoint a majority of any one board during his term of office. In a large number of cases the statutes creating such boards also definitely specified that not more than a certain number of the members of such boards should belong to one political party.

Governor's term

In more than half the states the governors have two-year terms,[1] and statutes providing either for boards or for offices with individual heads tended to provide for appointments running for a longer time than the governor's term. In Michigan the governor had a certainty before 1921 of appointing, during one term of two years, only five of the numerous state officers who were presumably subordinate to him. In Ohio before 1921 the governor often had substantially little appointing power in one term of two years, although his predecessor might have had the power to appoint almost all of the officers and boards serving during his term. The governor in a two-year term necessarily spends the first year learning something of his task; and in his second year he is facing a new election and a possible successor. His predecessor may, under the arrangement of terms in Ohio before 1921, and in other states, have chosen almost all of the important officers to carry on the work of the state government during his own term; and if he were lucky, he might be the governor to choose the officers to carry on the

[1] See table on p. 164.

work of state government not only during a part of his own term but also during the term of his successor.

Governor a conspicuous officer

The governor is the most conspicuous state officer. As a rule, the candidate for this office makes his campaign honestly and sincerely upon a platform of doing things; and, as the state officer most conspicuous in the eyes of the people, he is expected to keep his pledges. By the terms of the state constitution he is usually said to possess "supreme executive power"; and the constitution in most cases also makes it his duty "to see that the laws are faithfully executed."

Position of governor as an executive

What situation does the new governor face when he comes into office? He finds that the constitution has given him a fairly large share in the work of legislation. He has probably been elected upon a platform of proposed executive and administrative adjustment. When he faces the executive side of his task, he finds about the following situation:

(1) There is a group of constitutional executive state officers, chosen ordinarily by popular vote, just as the governor has been, with some constitutional recognition of the governor's superiority over them, but with the political relationships between him and these other elective state officers such that the governor can actually exercise little supervision over them.

(2) He turns to the statutory organization of the state government and finds a large number of boards, offices, and commissions, usually appointive by the governor (with the advice and consent of the senate), but in many cases with terms so adjusted that he does not control the appointment of individual officers or of a majority of the members of boards. Even if he does control appointments to the statutory boards, offices, and commissions, he finds so many of these bodies, and such conflicting authorities, that the possibility of controlling them is slight, if only because of their very multiplicity.

(3) The governor has probably made the enforcement of certain state laws a part of his platform. But when he comes to examine his powers with respect to this matter, he finds the enforcement of law throughout the state chiefly in the hands of locally elected officials over whom he has little control.

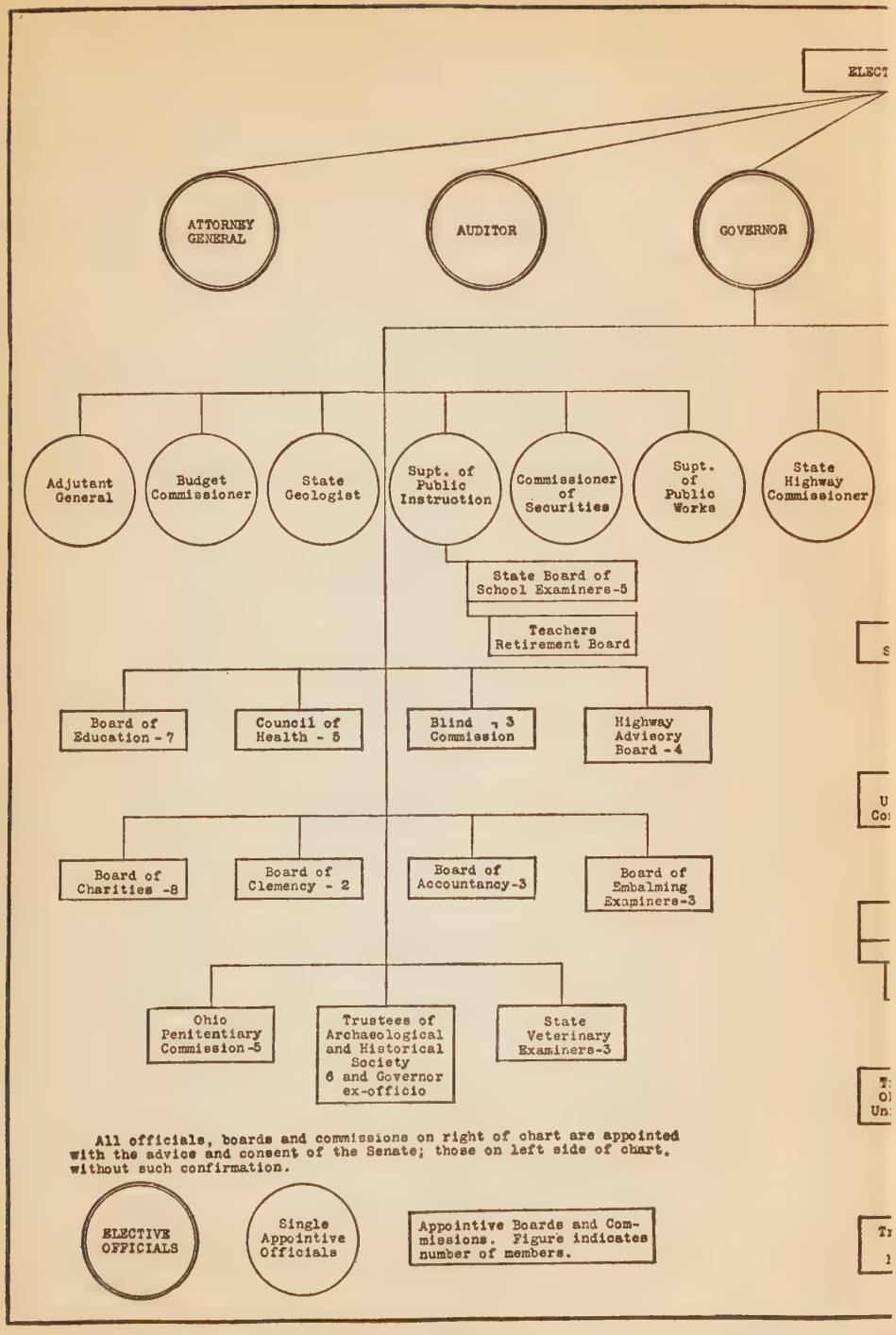
In his discouragement over any attempt to control the state administrative organization, the governor is likely to give up the administrative task as a hopeless one, and to turn to the field in which he has greater power, that of legislation. What we have done is to set up a so-called chief state executive with more power over legislation than over executive matters. We have made his task, from the administrative standpoint, largely a hopeless one. Governors have more often established reputations through legislative programs than through effective administration. Legislation is more spectacular, but efficiency in government depends upon orderly administration.

Movement toward consolidation

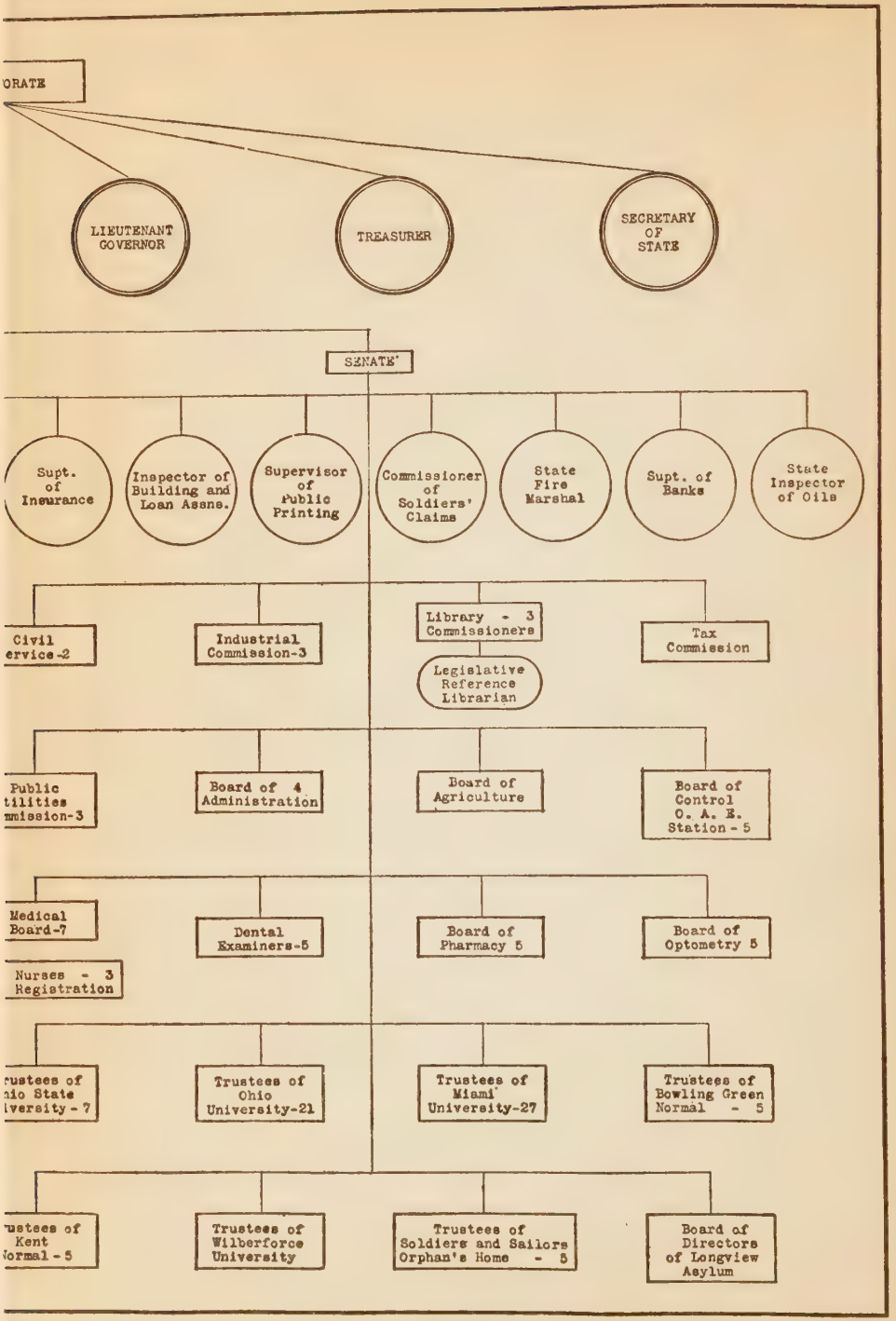
The difficulties just outlined are partly constitutional and partly statutory. Efforts were made by the New York constitutional convention of 1915 to deal through the constitutional text with the problem of consolidation of state administrative agencies, but the constitution proposed by this convention was rejected by the people. Massachusetts, by constitutional amendment of 1918, provided for an administrative consolidation, which was carried into effect by legislative act in 1919. Budget amendments in Maryland, Massachusetts, West Virginia and Nebraska have increased the governor's power over the appropriation policy of the state. More has been accomplished, however, with respect to the part of the state administration organized by statute, and which can therefore be altered without constitutional change.

Management of institutions

The states began very early to realize that a number of state charitable and penal institutions could not be efficiently managed through a separate board for each


ELECT
ATTORNEY GENERAL
AUDITOR
GOVERNOR
Adjutant General
Budget Commissioner
State Geologist
Supt. of Public Instruction
Commissioner of Securities
Supt. of Public Works
State Highway Commissioner
State Board of School Examiners-5
Teachers Retirement Board
Board of Education - 7
Council of Health - 5
Blind 3 Commission
Highway Advisory Board - 4
Board of Charities -8
Board of Clemency - 2
Board of Accountancy-3
Board of Embalming Examiners-3
Ohio Penitentiary Commission-5
Trustees of Archaeological and Historical Society 6 and Governor ex-officio
State Veterinary Examiners-3
All officials, boards and commissions on right of chart are appointed with the advice and consent of the Senate; those on left side of chart, without such confirmation.
ELECTIVE OFFICIALS
Single Appointive Officials
Appointive Boards and Commissions. Figure indicates number of members.

From report of Ohio Joint Legislative Comm



nittee on Administrative Reorganization, 1920

institution, without a coördination of the activities of the several institutions. A single state board was at first set up for the purpose of exercising some degree of supervision over the separately managed state institutions. Massachusetts created such a board in 1863, and was closely followed by other states. In more recent years the tendency with respect to charitable and penal institutions has been toward a single administrative management and control by one board, or by a single officer rather than by a board. In 1909 Illinois substituted a single board for separate boards administering each of its seventeen charitable institutions. In the field of charities and corrections most of the states now have their institutions managed by a single authority, and an increasing number have this central authority vested in a single department or individual, rather than in a board. Steps toward consolidation and reorganization of state activities have also been taken in a number of other fields, particularly labor and agriculture.

Piecemeal consolidation

Piecemeal consolidations of previously independent bodies acting in the same field have, however, accomplished little to reduce the multiplicity of state administrative agencies; for each new session of a state legislature has usually created as many offices as were abolished through consolidation. The accompanying chart of the Ohio administrative organization in 1920 indicates something of the scope of state activities and of the complexity of administrative organization. This chart represents the situation after all of the state's activities in the fields of labor, agriculture, public health, and the management of charitable and penal institutions, had been consolidated into four bodies. In recent years the important development has been toward a closer coördination of all the administrative functions of state government carried on under statutory authority. This development is traced in the succeeding chapter.

CHAPTER X

REORGANIZATION OF THE STATE EXECUTIVE

Official investigation

STATE governments have so increased the number and importance of the things they do, and the amount of their expenditures, that the problem of state administrative reorganization has become increasingly important in recent years. During the past decade investigations of the existing administrative systems have been made in more than one third of the states; and a series of valuable reports has been published summing up the results of these investigations. The two most important reports are that of the Illinois Efficiency and Economy Committee, published in 1915, and that of the New York Reconstruction Commission, published in 1919.

Importance of problem

The problems of state administrative reorganization are the most pressing in the entire field of state government; for the administrative organization is the permanent machinery for the purpose of doing the state's work, and through the executive department the bulk of state expenditures is made. State governments in 1919 spent more than $600,000,000; and upon the efficiency of state government depends not only the work conducted directly by the state, but also to a very great extent the effectiveness with which large sums of money are spent by local governments within each of the states.

Types of executive functions

Through its elective officers or its appointed boards, commissions, and officers, the state executive department performs three types of functions: (*a*) Those that are purely administrative. Some of these require an exercise of broad discretion, as in determining the location of and plans for an important charitable institution; others are purely ministerial or clerical, as the duty of

a secretary of state to furnish certified copies of state documents upon request and the payment of a fee. (*b*) Those that are quasi-legislative. There has been a steady tendency to place greater and greater rule-making powers upon state administrative bodies, with respect to health, agriculture, labor, and many other matters. (*c*) Those that are quasi-judicial. With the enactment of workmen's compensation laws, administrative bodies have been created to pass upon claims of injured workmen for compensation. Another illustration of a quasi-judicial function is the power of state public-utility or railroad commissions to determine rates to be charged by public utilities. The valuation of property for purposes of taxation is also quasi-judicial, as are hearings by civil service commissions of charges against state employees. These are functions of weighing evidence and deciding issues in much the same manner as a court. Most quasi-judicial functions of administrative bodies are by statute made expressly subject to review by the courts, though this is not true usually of valuations for taxation.

Functions are united in dealing with same subject

Purely administrative functions are ordinarily regarded as functions to be performed by, or under the supervision of, a single officer. Public sentiment favors the performance of quasi-legislative and quasi-judicial functions by a board or commission, on the theory that error is less likely to occur if action is taken by a group rather than by an individual. No difficulties in organization would present themselves if each of these three types of function related to different matters. But in fact the three must often be performed with reference to the same governmental activity. For instance, in the enforcement of labor laws there will be a large amount of administrative work; but those in charge of the enforcement of such laws will also probably have large rule-making power; and some authority must be set up for the decision of claims arising under workmen's compensation laws. In reorganizing state administration the existence

CHAP. X

of the three types of functions constitutes a serious problem.

ATTEMPTS TO REORGANIZE STATE ADMINISTRATION WITHOUT INCREASING POWER OF GOVERNOR

The Wisconsin plan

In a number of states the effort to coördinate state administrative activities has taken place in such a manner as to weaken, rather than to improve, the position of the governor. Wisconsin a number of years ago began to set up a series of important commissions, with the members of each commission appointed with overlapping terms, and with continuing appropriations. In this manner the commissions, once created, were made to a large extent independent of the biennial sessions of the legislature, and also, through overlapping terms, largely independent of the governor. In addition to this organization, Wisconsin established in 1911 a board of public affairs which is composed of the governor, secretary of state, president *pro tem.* of the Senate, speaker of the Assembly, chairman of the Senate finance committee, and three other persons appointed by the governor and approved by the Senate for two-year terms. The board has accounting and efficiency control over the state government; it collects estimates from the different offices of the state government; and it recommends a budget to the state legislature. In the preparation of the estimates the governor-elect has the right to be present.

Reorganization in Michigan

Michigan in 1921 passed several laws creating departments of labor and industry, agriculture, state welfare, conservation, and public safety. The directors of the departments of agriculture, state welfare, and conservation, and the commissioner of public safety, are appointed by the governor. However, the state welfare department is provided with a series of commissions which will actually manage the institutions, each commission handling a group of institutions and replacing

separate boards for each institution. The commissions have jurisdiction over the institutions, though the heads are appointed by the governor on the recommendation of the proper commissions. The director of the department does not appear to have been given a great deal of power. Although the governor appoints the director of conservation, power is directly vested in a commission of conservation, of seven members. The department of labor and industry has at its head a commission of three members appointed by the governor with the advice and consent of the Senate, with a chairman appointed by the governor to have general supervision over the administrative affairs of the department. The departments established in 1921 constitute steps toward a more consolidated administration under the authority of the governor. But another law passed at the same session provides for a state administrative board composed of the governor, secretary of state, state treasurer, auditor-general, attorney-general, state highway commissioner, and superintendent of public instruction. This board is given general supervisory control over all offices and institutions of the state, and may issue orders with respect to the conduct of business, though no order may be issued without the written approval of the governor. Powers with respect to the state budget and state purchasing are transferred to this board; and the board is given supervision over state accounting, and over the planning of state construction work. The Michigan plan may, in view of the creation of this board, be classed as one that to a large extent seeks to place the executive powers of the state in the hands of a commission or board composed of all of the elective state officers. The superior power of the governor is recognized, but not in such a manner as to give him complete administrative command.[1]

[1] See note in *American Political Science Review*, XVI, 579-581 (1921), on the Michigan reorganization of 1921.

CHAP. X

Indiana

Indiana created in 1919 a state highway commission, and at the same time established a department of conservation into which it consolidated a number of previously separate state activities. Both the state highway commission and the department of conservation are placed under boards of four members each, not more than two of whom may be from the same party, and one of whom is appointed each year. These commissions choose the directors for the administrative work of these portions of the state's service. This type of organization does not, of course, in any way aid in the establishment of a really coördinated administration under a single authority.

New York

New York in 1921 abolished the offices of military training commission, state superintendent of elections, department of narcotic drug control, and state printing board; but at the same session created a motion-picture commission and a water-power commission. At the same time the state reorganized its public service commissions, its department of labor, and its tax commission, and provided a new organization for budgetary and contract work. The New York department of labor, as established by legislation of 1921, has at its head an industrial commissioner appointed by the governor, with the advice and consent of the Senate, for a four-year term. The governor serves for a two-year term. An industrial board of three members is created in the department of labor with rule-making and quasi-judicial powers, each member of the industrial commission being appointed for a six-year term, one every two years. The commissioner, however, is given full administrative control, and may sit with the industrial board in consideration of any matter except reviews under the provisions of the workmen's compensation act. The relationship between the industrial commissioner as the head of the department and the industrial board for the exercise of rule-making and quasi-judicial powers is substantially

the same as that recommended by the state's reorganization commission.

At the same session the New York legislature reorganized the tax commission and consolidated the tax work of the state more effectively. The legislation for this purpose provides for three commissioners appointed by the governor, with the advice and consent of the Senate, for six-year terms, one every two years. The president of the commission is made its executive head and is given sole charge of the administration of the department. The other two members exercise certain quasi-judicial powers without control, but otherwise are under the direction of the president. At the same session the state organization for controlling public service corporations was reconstituted. A public service commission of five members was established, with the members serving for ten-year terms; and a transit commission of three members was provided for the city of New York. In the provision for these commissions there is no recognition of the need for an administrative head, and in this respect the New York legislature disregarded the recommendations of the reconstruction commission. At the same session, in creating a motion picture commission the legislature provided for three members with overlapping terms and with no administrative head. In the two cases of taxation and labor, the legislature reorganized services in such a way as to establish an administrative head of a department, even though a commission was continued for quasi-judicial and rule-making power; but in two other cases it entirely disregarded this more satisfactory plan.

Financial control in New York

At its 1921 session the New York legislature also amended the state finance law by providing for a board of estimate and control composed of the governor, the chairman of the finance committee of the Senate, the chairman of the ways and means committee of the Assembly, and the state comptroller. This board has

CHAP. X

power to investigate, to make recommendations to heads of departments, and to see that such recommendations are carried out. It also receives and revises estimates of appropriations, and presents recommendations to the two houses of the legislature. Legislation of 1922 has withdrawn from this board control vested in it in 1921 over central purchasing. In it is vested control of all public printing. New York, through its board of estimate and control, very much as Wisconsin through its board of public affairs and Michigan through its state administrative board, seeks to put a large portion of the executive authority of the state in commission.

New Jersey

New Jersey has gone farther than any other state in the direction of creating a series of administrative commissions substantially independent of any one governor. By legislation begun in 1915 and continued in succeeding sessions, this state has established consolidated departments of shell-fisheries; commerce and navigation; conservation and development; taxes and assessments; agriculture; labor; charities and corrections; fish and game. The department of labor has at its head a commissioner of labor appointed by the governor, with the advice and consent of the Senate, for a five-year term. The governor of the state serves for a three-year term, so that he does not have complete control over this office. Moreover, the departments of agriculture, shell-fisheries, commerce and navigation, conservation and development, and charities and corrections are substantially removed from the control of the governor. Each is under the control of a board of eight members; and in three instances not more than four of these members may belong to the same political party. The members of these boards are appointed by the governor, with the advice and consent of the Senate, for overlapping terms longer than that of the governor. In the case of the department of agriculture, the governor's power of appointment is limited to persons chosen by

delegates of certain organizations, and in the case of the department of charities and corrections the governor is required to make his appointments without regard to political considerations. All of these boards, however, choose and control the heads of their respective departments; and the heads of the departments of shell-fisheries, commerce and navigation, agriculture, conservation and development, and charities and corrections are in no real way under the supervision of the governor at all, although the governor is *ex officio* a member of the board of charities and corrections. The secretary of agriculture is appointed within the classified civil service, and the commissioner of charities and corrections is in the unclassified civil service, and is to hold his office at the will of the board that appoints him. The board of fish and game commissioners and the state board of taxes and assessments are composed of members with overlapping terms serving for five years.

From this brief outline of organization, it will appear that the administrative work of the state of New Jersey has been placed in a group of commissions, apparently with the notion of protecting it from the governor. Not only this, but by statute a state-house commission has been created, composed of the governor, state treasurer, and state comptroller. However, the state purchasing agent, acting under this commission, is appointed by the governor, with the advice and consent of the Senate, for a five-year term, removable by the governor for cause.

In 1915 New Jersey passed a law requiring that certain of the more important bodies be represented at a meeting once each month. The first meeting was to be called by the governor, who was made *ex-officio* member and chairman, and the group of six department heads so required to meet once each month were authorized to submit recommendations annually to the legislature to promote efficiency and to prevent duplication in engineering work. Estimates for appropriations are prepared

CHAP. X

for the governor on blanks furnished by the comptroller, and the governor transmits requests to the legislature with his recommendations. With respect to appropriations, however, the state-house commission is authorized to permit transfers of items within appropriations granted to any department; and emergency funds, when appropriated, have been placed under the authority of the state-house commission, rather than under that of the governor.

Summary

The states just discussed proceed largely upon the assumption that the governor is a person to be distrusted, and that a large amount of administrative authority in the state should be vested in a board of which the governor is but one member. New Jersey has gone farthest, not only in this respect, but also in the establishment of consolidated departments substantially independent of any central executive control. Such organizations as those just discussed do not always lead to a weakening of the governor's power. Where other elective state officers are brought into commissions or boards, with legal powers substantially equal to those of the governor, the very establishment of this closer official relationship may increase the actual influence of a governor possessing a dominant personality. The governor has an initial advantage over the other state officers, for in any such position his power and influence are the greater, whatever may be the provisions of law.

ATTEMPTS TO BETTER CONDITIONS THROUGH POWER OF GOVERNOR

California

Another group of states has sought to obtain a better administrative organization by means of a coördinating board rather completely under the control of the governor. California in 1911 created a state board of control of three members to hold office at the pleasure of the governor. It was made the duty of this board to examine

the books of all institutions, to visit institutions, to pass on claims against the state, to approve all warrants drawn on the state treasury, to set up an accounting system for the state, and to approve contracts for the purchase of supplies and materials. The department of public accounting created under the board was authorized, with the approval of the board, to require reports from all offices and institutions. The board was empowered, with the approval of the governor, to authorize the creation of deficiencies. Here we have a substantial recognition of the fact that, with the multiplicity of administrative bodies within the state, the governor can not exercise an effective personal supervision over them. What California therefore did in 1911 was to create a board of three members, subject to the control of the governor, who should act as his agents in exercising such supervision.

Alabama

Alabama in 1919 did much the same thing by providing for a state board of control and economy of three members appointed by the governor, and to hold at his will, removable at his discretion. This board, however, was not given as wide authority as the California board, but was merely authorized to expend all moneys appropriated by the state for eleemosynary and charitable institutions, and to make purchases for all departments and activities of the state government. Separate boards were left in Alabama for each institution; but the state board is given charge of the business affairs of the institutions as well as supervision over all state purchases.

Kansas

Similar to the Alabama organization is the board of administration created in Kansas in 1917. This board is composed of four members, of whom the governor is one member and chairman. The other three members are appointed by the governor, by and with the advice and consent of the Senate, with overlapping terms; and they may be removed by the governor. The members

CHAP. X

are required to give all of their time to their offices, and supersede separate boards for the benevolent, educational, and penal institutions of the state. This board is required to employ a business manager for the institutions under its control, and may discharge him. It is contemplated that the business manager shall be really the administrative head of all of the work under the board of administration. The term "business manager" has caused the Kansas organization to be rather widely discussed, although it does not go so far as those of California and Alabama.

West Virginia

The state board of control of West Virginia is, in a way, the parent of boards of control such as those established in California, Alabama, and Kansas. This board is composed of three members, appointed for six years with overlapping terms, whose function it is to manage the charitable and penal institutions of the state and to have charge of the financial and business affairs of the educational institutions. It makes plans for all new buildings to be constructed by the state, and purchases supplies for charitable, penal, and educational institutions. The state board of education, composed of a large number of members, but appointed in the same manner, has charge of the educational affairs of state educational institutions. The board in West Virginia is not so completely under the control of the governor as are the boards in California, Alabama, and Kansas.

Tennessee

The board for the administration of state institutions in Tennessee, and the board of control in Texas, are somewhat comparable with the boards just referred to. The board of administration of state institutions in Tennessee is made up of the governor, treasurer, and general manager of state institutions, but the governor's control of the board is made effective by the fact that the general manager of state institutions is appointed by the governor and is removable by the governor for cause. The general manager is, however, appointed for a four-

year term, whereas the governor is elected for only a two-year term. The board for the administration of state institutions manages the institutions and purchases supplies for them. In Tennessee there was created by legislation of 1917 a state budget commission composed of the governor, comptroller, treasurer, secretary of state, and auditor. This plan of placing budget control in the hands of the elective state officers makes the Tennessee situation much more comparable with that of the group of states first discussed than with those such as California and Alabama. The budget organization in Tennessee is similar to that provided for West Virginia by constitutional amendment, and both West Virginia and Tennessee thus place the executive control to a large extent in the hands of boards of which the governor is but one member.[1]

Texas

Texas is comparable with Tennessee in its state board of control, which is composed of three members appointed for terms of six years, one every two years. The Texas state board of control, however, has a wider jurisdiction in some ways, and is organized into divisions of public printing; purchasing; auditing; design, construction and maintenance; estimates and appropriations; and eleemosynary institutions. This board has control of the purchasing of supplies for all departments of state government, and supervision over the erection of all state buildings. It also has the duty of obtaining estimates and preparing a biennial budget, as well as that of exercising the powers previously vested in the boards of managers of charitable institutions.

COMPLETE ADMINISTRATIVE REORGANIZATIONS

Progress of movement

A number of states have realized that the way to reorganize state administration, so far as this can be done by statute, is not to proceed by piecemeal reorgan-

[1] North Dakota in 1919 created a board of administration with powers somewhat broader than those of the West Virginia board.

CHAP. X

ization of specific departments, while continuing to create new and additional offices, nor yet to set up a board through which the governor may exercise some greater degree of supervision over numerous offices. These states have proceeded upon an assumption precisely contrary to that of the group of states of which New Jersey is the most conspicuous example, and have thought that the best administrative organization for the state is a small series of departments, each having within it a group of related functions and each under a director or head responsible to the governor. New York sought in an ineffective and unsatisfactory way to become the leader of this group of states in 1915, but the proposed constitution with provisions for this purpose was rejected by popular vote. Illinois in 1917, under the guidance of Governor Frank O. Lowden, through its civil administrative code led the way in the direction of an effective administrative reorganization under the governor into a small group of departments. Nebraska and Idaho followed in 1919; Washington and Ohio in 1921.[1] Massachusetts in 1919, in compliance with the provisions of a constitutional amendment adopted in 1918, reorganized its services, and is sometimes classified in this group. However, Massachusetts organized its services into sixteen departments in addition to its elective offices, and preserved the substantial independence of at least nine other statutory offices. In view of these facts, Massachusetts can not be classed with the states that have taken a long forward step toward administrative reorganization —a fact which is recognized by a resolve of the Massachu-

[1] See the *American Political Science Review*, XV, 380-384 (1921), for notes on administrative reorganizations in Ohio and Missouri; and the same journal, XV, 568-579 (1921), for notes on Washington and California. A good account of earlier proposals, and of reorganizations in Illinois, Nebraska, and Idaho, will be found in the Report of Reconstruction Commission on Retrenchment and Reorganization in the State Government (Albany, 1919); and in Cleveland and Buck, *The Budget and Responsible Government* (New York, 1920). For a survey of conditions in the states before complete reorganizations began, the most valuable book is the Report of the Illinois Efficiency and Economy Committee (Springfield, 1915).

setts general court in 1921 establishing a special commission to investigate problems of administrative organization, and by the report of that commission submitted in 1922.

Partial steps

Pennsylvania has done a great deal in recent years by separate acts of the legislature in the way of reorganizing its administrative system; and the state of Missouri has taken a long step in a series of laws enacted in 1921. The Missouri legislation is not altogether satisfactory, and the more essential elements that go to make up the Missouri organization were suspended by referendum petitions. By legislation of 1921, California and Utah have taken hesitating steps toward complete administrative reorganizations. Maryland in 1922 adopted an ineffective plan of reorganization.

Analysis of plans

None of the states in the group just enumerated, which have done the most in the way of reorganizing their administrations, have hit upon an ideal scheme. The reorganization acts in Illinois, Nebraska, Idaho, Washington, and Ohio all are a result of compromise with various political, official, and institutional interests, and there would be no great difficulty in improving them; but they do constitute the most effective examples of state administrative organization yet provided for in this country. The number of departments and the types of departments created in these several states vary considerably. Illinois established nine departments. The Nebraska legislation of 1919 provided for six departments; but Nebraska has a number of constitutional bodies, such as its board of commissioners of state institutions, board of regents, and state railroad commission, whose activities could not be brought within the scope of a statutory reorganization. Idaho, by legislation of 1919, reorganized its state administrative service into nine departments, but in 1921 consolidated the work of its department of commerce and industry with that of its department of finance. Ohio has provided eight depart-

CHAP. X

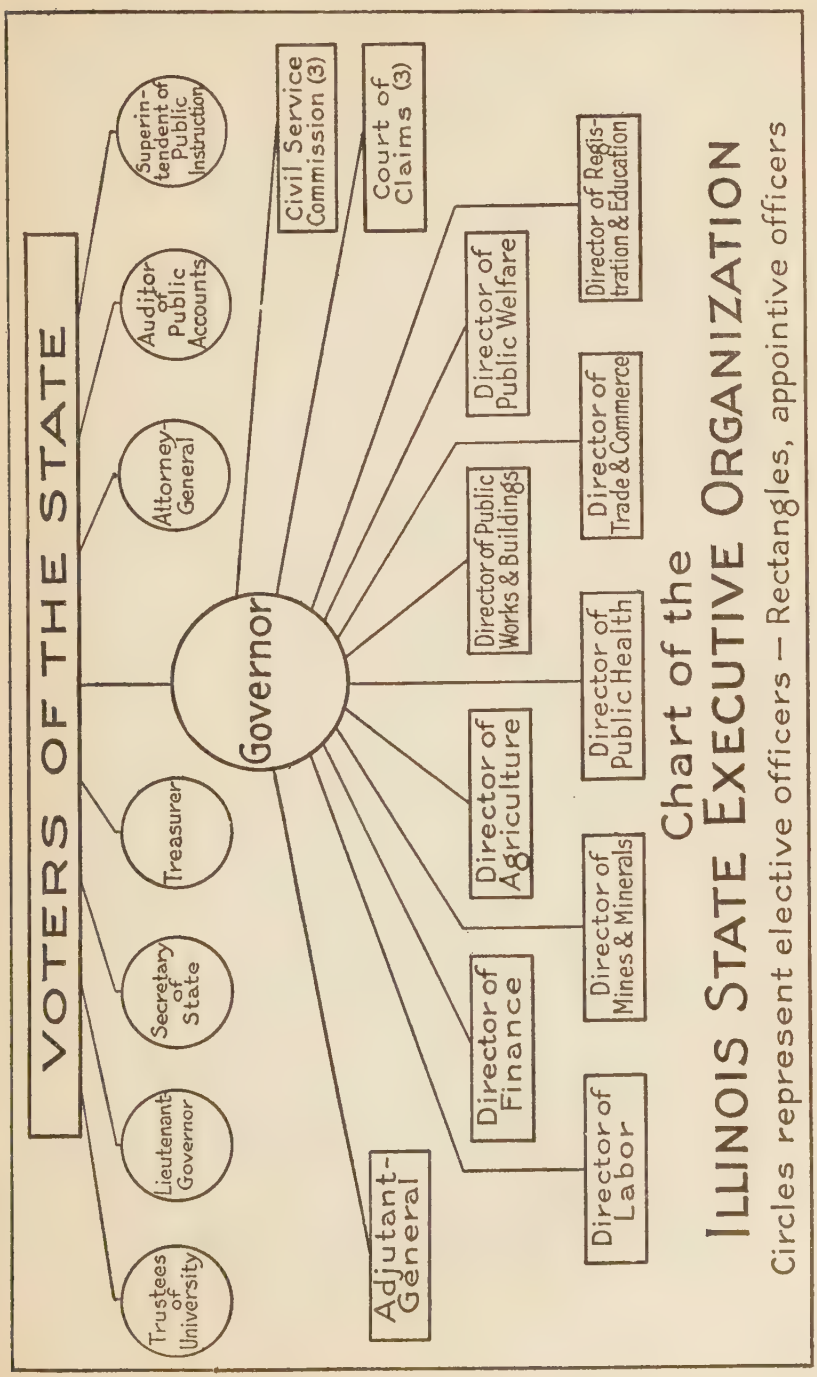
ments, and Washington ten. Differences in local needs have caused departments to be established in one state for activities which constitute merely divisions of departments in another state. For example, the state of Washington has departments of conservation and fish and game, and Idaho has a department of reclamation. Problems regarding fish and game are clearly more important in a state like Washington than in either Ohio or Illinois. Problems of conservation and reclamation play a larger part in Idaho and Washington than they do in more distinctly industrial states such as Ohio and Illinois, although there may not be so much reason in fact for this difference. The proposed reorganization in Arizona in 1921, which failed of enactment, provided for a consolidated department of labor and industry, uniting the activities which in Illinois and Ohio are properly organized into two departments. The Illinois plan of administrative reorganization is fairly typical of present tendencies, and is outlined in the accompanying chart. Although states will necessarily vary in the departments that they need and in the organization that they adopt, it is yet desirable that there should be, for the states adopting a complete administrative reorganization, a similarity of departmental names, so that the activities found in one state under a title may be found in other states under much the same title.

Upon the basis of the outline before presented of legislation in the several states, it may be well to analyze briefly the chief problems of state administrative reorganization.

CHIEF PROBLEMS OF STATE ADMINISTRATIVE REORGANIZATION

Term of governor

In more than half of the states the governor serves for a two-year term. There is no possibility of organizing an effective state administration as long as the head of that administration changes so frequently.


VOTERS OF THE STATE
Trustees of University
Lieutenant Governor
Secretary of State
Treasurer
Attorney-General
Auditor of Public Accounts
Superintendent of Public Instruction
Governor
Civil Service Commission (3)
Court of Claims (3)
Adjutant-General
Director of Finance
Director of Agriculture
Director of Public Works & Buildings
Director of Public Welfare
Director of Labor
Director of Mines & Minerals
Director of Public Health
Director of Trade & Commerce
Director of Registration & Education
Chart of the
ILLINOIS STATE EXECUTIVE ORGANIZATION
Circles represent elective officers — Rectangles, appointive officers

CHAP. X

Constitutional state officers

The governor, as the chief executive officer of the state, acts, and must for a long time act, in coöperation with a group of other elective state officers. It is desirable that this group be reduced in number, and that the states work toward the federal plan of an administrative organization completely under the control of a popularly elected and responsible executive officer.

Constitutional change necessary

Changes in the term of the governor and in the number of other elective state officers require constitutional alteration, and must come slowly. However, it is desirable that the governor be recognized as the chief executive officer of the state, so far as this result can be accomplished by statute. A number of states have tended to place the state administrative power in commission, but under such a plan it is out of the question to organize the work of the state effectively, or to hold any one person responsible for the proper conduct of that work.

Fear of concentrated power

The proposal to organize the state administration into a small group of departments, each responsible to the governor, arouses some fear that such a plan will set up a despotism. Such a plan is in theory that of the national government, and there is nothing to be feared from organizing a responsible state administration under the control of a popularly elected governor chosen at most for a period of four years. It would be wise, however, to have the governor of the state chosen for a period even longer than four years, but not eligible for reëlection. The two-year term makes it impossible to organize a state administration effectively, and a four-year term, with the possibility of reëlection, ties the hands of an ambitious governor. The governor is the most conspicuous officer of the state, and in virtually all of the states he now appoints officers who are more important than some of those who are elective by the people of the state at large.

Governor becomes more responsible

A good deal of progress has been made toward the simplification of state administrative organization, but

in the main the state plan is still that of hiding responsibility in hundreds of little separate compartments. Improvement may be expected from the concentration of power in the governor, and from knowledge on the part of the people as to whom they may hold responsible for the proper conduct of state affairs. Of course the possibility of abuse of political power goes with the opportunity for improving state administration. Shall we assume that our state governments are bad, and seek to prevent their doing anything effectively, while at the same time imposing upon them constantly greater and more important tasks; or shall we loosen the hands of state government and give it a chance to do its work effectively, recognizing at the same time that increased power to work effectively means an increased possibility of danger as well? The increased possibility of danger carries with it, however, an effective means of discovering the danger, because the executive organization and the governor as its responsible head will under such a plan be so conspicuous that inefficiency or corruption can not hide itself.

Senate confirmation

In order to accomplish this purpose it would be wise, wherever possible, to vest complete power to appoint the heads of departments in the governor, without the advice and consent of the Senate. The responsibility for administration is thus more definitely vested in the governor; and should an occasion present itself when the state Senate is out of political harmony with the governor, no confusion results from an impossibility of making the appointments which the governor thinks should be made for the conduct of the work of the government for which he, the governor, is responsible.

Number of departments

The departments into which the state administrative work is organized should be few enough for the governor to control, and each should have closely related functions. It is possible that more harm than good will come from an effort to unite control over both educational and penal

CHAP. X

institutions, as has been done in West Virginia, Kansas, and some other states; and it is also questionable whether the departments of business control and efficiency organized in Washington may not, because of overlapping jurisdictions among themselves and with the superintendents of institutions, come into serious conflict with one another, to the detriment of the service of the state. Ordinarily, placing upon two or three officers or bodies a responsibility for different parts of the same task will result unsatisfactorily. Often types of work that seem closely related will involve serious possibilities of conflict. For example, it may be highly unwise to place the licensing of physicians under a state department of health. A department charged with financial control should not be given other functions in the state service.

Responsibility of departments

Once the organization into departments has been agreed upon, the head of each department should be given complete responsibility, under the governor, for the work of that department. No governor can properly hold the head of a department responsible for the work of the department, and at the same time dictate to him the details as to who shall be employed within the department or as to the methods of its administration. This does not mean that there should be an absence of coöperation among the departments, for the heads of the small group of administrative departments should meet at regular intervals with the governor for a discussion of common problems.

Organization alone does not assure success

No plan of governmental organization will succeed, in and of itself; for a good plan can be operated badly, and a bad plan may at times operate fairly well. The success of government depends primarily upon the human agencies that conduct it. Governmental problems are different from those of private business, but the principles of successful organization are much the same in both; and the plans of state administrative organization now finding favor embody the same principles as the

more successful business organizations. A practical difficulty always presents itself when an effort is made to consolidate independent offices. Persons connected with each office naturally think that its independent position should not be disturbed; and under such conditions each independent state function becomes, in the minds of its friends, the most important in the state service. To interfere with it in any way will, it is urged, endanger the safety of the state and set up a despotism in the hands of the governor. Some of this sentiment is real, but most of it is inspired by the fear that jobs are in danger.

Quasi-legislative and quasi-judicial functions

One of the most serious problems in connection with state administrative organization is that of the quasi-judicial and discretionary functions to be performed by the state. Tax commissions, public-utility commissions, and industrial commissions for the administration of workmen's compensation laws must pass upon matters of a quasi-judicial character, such as the valuation of property, the reasonableness of rates, and the question of whether an injured workman is entitled to compensation. Not only this, but there has been a tendency in recent years to vest a greater and greater degree of rule-making power in administrative bodies, so that in Ohio, New York, and a number of other states some provision must be made for the adoption by administrative authority of a body of subordinate legislation, power to enact which has been delegated by the legislature. This is true, not only of the department of labor, but also in many cases of departments of health and of agriculture, and of other bodies within the state government. These quasi-judicial and quasi-legislative functions are of necessity closely related to large administrative functions.

Continuance of commissions

How should these functions be performed? It has not been uncommon, even in the states that have gone farthest in the way of an administrative reorganization, to leave commissions with overlapping terms for the performance of functions with respect to civil service,

public utilities, labor, and taxation. These functions must be performed, and to some extent it is desirable to have a group, rather than an individual, perform certain parts of them. In the Illinois reorganization, the public utilities commission, tax commission, and industrial commission are substantially independent, and are placed within the departments of trade and commerce, finance, and labor merely for administrative purposes. The Ohio reorganization of 1921 definitely seeks to vest in the heads of departments the administrative work of the commissions, and makes the heads of the departments of commerce, finance, and industrial relations *ex-officio* secretaries of the public utilities commission, tax commission, and industrial commission, respectively.

Administrative head with commission

Massachusetts, by its reorganization of 1919, places its civil service administration under a single commissioner, but provides two associate commissioners who are to act with the commissioner in connection with making rules and hearing appeals. This state has also adopted a somewhat similar organization for its department of labor and industries. The New York legislation, reorganizing the tax commission and the department of labor in 1921, gets much the same result by providing for three tax commissioners, but with the president having complete administrative control; and for a department of labor with an industrial commissioner at its head, but with an industrial board of three members for rule-making and quasi-judicial powers, the industrial commissioner being authorized to sit with the industrial commission in most matters. The department of labor and industry, organized in Michigan in 1921, follows a somewhat similar plan, providing for a commission of three members, with the chairman appointed by the governor and having general supervision over the administrative affairs of the department.

Commission to appoint head

It is, of course, possible to adopt a plan somewhat similar to that employed before 1921 in connection with

the department of health of the state of Ohio. Under this plan a board chose the executive head of the department, but after choosing him remained merely as a body for rule-making and for certain other powers, in these respects acting upon matters submitted by the head of the department, who became, upon his appointment, a member of the board. This plan, however, largely destroys the power of the governor over the head of such a department, and is for this reason unwise.

New York suggestion

For a short time the public service commission for the first district in New York (the city of New York) was composed of but one commissioner, and this plan did not seem to work unsatisfactorily. The New York reconstruction commission recommended that the public service commissions for both the first and second districts should be composed of a single commissioner appointed by the governor, with the consent of the Senate, and that each commissioner should have two deputies to act with him in the hearing of quasi-judicial and quasi-legislative questions, but with the commissioner responsible for the final decision. This plan was not adopted, and the new public service commissions created in 1921 have no single heads. This continues what in most of our states has been one of the chief defects of public-utility regulation.

Individual head

There is a definite tendency at the present time toward the use of single individuals for quasi-judicial or quasi-legislative work. In almost all of the quasi-judicial work of administrative bodies there is a judicial review, and decision by one individual will not result in abuse. Maryland has adopted the plan of a single state employment commissioner instead of a civil service commission. In Wisconsin in 1921 a legislative committee recommended the replacing of the tax, conservation, and civil service commissions by single officers; and in some states single tax commissioners have been provided with satisfactory results. Legislation of North Carolina and Tennessee in 1921 indicates a tendency in this direction. The

CHAP. X

problem of properly adjusting the relationship between commissions and administrative responsibility has not been fully worked out. The plans employed in Ohio, Massachusetts, New York, Michigan, and other states must be observed, and more experience must be gained upon this point, before we can have any judgment as to what plan will be best, if commissions for certain purposes can not be replaced by single officers. Purely advisory commissions are not open to the same objections as are commissions charged with administrative duties, and may often serve as useful aids in executive work.

Purchasing and budgets

From the standpoint of mass of legislation, the two subjects upon which state administrative reorganization has gone farthest are those of state purchasing and state budgets. Some states have done nothing more toward coördinating their administrative organization than to set up central machinery for purchasing or for budget estimates, or for both.

Financial control

The determination as to what estimates should be presented by administrative departments for proposed future expenditures, and the control of expenditures after appropriations are made, are primarily executive functions; for the executive department normally spends much the greater amount of money appropriated for state governmental purposes. Four states (Maryland, West Virginia, Massachusetts, and Nebraska) have adopted constitutional amendments with respect to the budget. Budgetary legislation has been enacted in nearly all of the states, but little result has been obtained in many of these states from so-called budgetary legislation. Most of this legislation has proceeded without an administrative reorganization. Some states (West Virginia by constitutional amendment) place the preparation of estimates for budgetary purposes in the hands of a commission, of whom the governor is but one. Without a consolidated administration, budget estimates are apt to constitute merely a set of compiled figures. The

governor can not control what will be asked or obtained by those not responsible to him, and a single executive budget policy can come only from a consolidated executive under a single command. The term "budget," when applied merely to a consolidated statement of estimates, means nothing; but this is the general use of the term in many of the states that have adopted a so-called budget plan. The compilation of estimates into a single document, with some revision before they go to the legislative body, is of some assistance; but, unless there is a single command to make sure that the budget as proposed is adhered to, the estimates amount to little. Not only this, but after a budget is adopted it means little unless there is permanent machinery within the state government for the centralized administration of the budget, so as to make sure that deficits are not incurred and that economy is practised. These are executive functions, although the function of determining whether an appropriation shall be made, and if so how much, is a legislative function, through which the legislative department ought to control the policy of the state administration. In most of the states the legislative department is unable to obtain information upon the basis of which to exercise an adequate supervision over appropriations. Basis for such a supervision can be obtained only through a consolidated executive administration.

Buildings and supplies

State governments purchase supplies in large quantities and engage in construction work on a large scale. In 1919 there were more than 25,000 inmates of state institutions in Illinois. The problems of purchasing supplies for state institutions and offices, of constructing buildings for state use, and of building roads are the same as those of construction and purchasing in private business. So long as state administration is composed of a great number of independent offices, a uniform policy of state purchasing is difficult. All offices will need some supplies and will desire to purchase independently.

CHAP. X

Where each state charitable and penal institution is under a separate board, that board will desire to maintain its independent policy as to the purchase of supplies and the construction of new buildings. State institutions to some extent still obtain building appropriations upon the basis of their relative political influence; and few, if any, states have worked out policies as to their needs in new building construction over a period of years. In many states where there has not been a complete administrative consolidation a central board or office has been given supervision, or actual control, over the purchase of state supplies and the construction of state buildings. A uniform policy as to these matters is certain to result in economy, although this does not imply that all supplies should be purchased through a central agency. These problems can best be worked out through a unified executive organization.[1]

Continuity of policy

Neither in the nation nor in the states have we developed much continuity of administrative policy from one administration to another. A new president comes into office with new policies and with little detailed knowledge of the administrative work of the national government, or of the reasons why certain policies were adopted by his predecessor. A state governor comes into office under the same conditions.

Argument for overlapping boards

The main argument for overlapping boards, such as have been set up in New Jersey, is that of continuity of policy, and of a more permanent tenure for technical experts in government service. The New Jersey plan, however, does not necessarily obtain continuity of policy and permanent service for technical experts; while it destroys the possibility of handling state business as a single enterprise. Some means must be developed, how-

[1] For a review of steps taken in this field, see A. E. Buck, "The Coming of Centralized Purchasing in State Governments," *National Municipal Review*, Supplement, February, 1920. See also A. G. Thomas, *Principles of Government Purchasing* (New York, 1919).

ever, both in the national and in the state service, for a continuity of expert tenure and for a continuity of governmental policy in matters not political in character.

Permanent experts

This constitutes one of the serious problems in connection with both state and national administrative reorganization. By civil service legislation we have sought to take some steps toward continuity of service for government experts. But, in the main, we have limited the effective application of civil service to the less important and more subordinate employees.

Civil service

State civil service laws are in force in ten states,[1] by which appointments to many positions in the state service are made after tests of fitness, and some safeguards are imposed to insure permanency of tenure so long as employees perform their services satisfactorily. New York, Ohio, California, and Colorado have constitutional provisions relating to this matter. In New York, Massachusetts, New Jersey, and Ohio, state civil service laws apply also to many local appointments, as well as to those in the state service.[2] Civil service laws were adopted primarily for the purpose of destroying the spoils system. It is notorious in American politics that appointments to positions in governmental service are to a large extent made for political reasons, and not because of merit. Where an elective officer has subordinates to appoint, such appointments are in many cases made in fact, not by the head of the office, but by the head of the political organization that controlled the nomination and election. State civil service laws have accomplished much good, as has the adoption of the civil service principle in a large and growing number of cities. But until recently the results of civil service reform in the states

[1] California, Colorado, Illinois, Kansas, Maryland, Massachusetts, New Jersey, New York, Ohio, and Wisconsin. Connecticut repealed its civil service law in 1921.

[2] For a review of state civil service laws see Mathews, *Principles of American State Administration,* Chapter IX.

CHAP. X

have been largely negative. Safeguards as to competency and tenure have probably been more effective in the field of public education than elsewhere, although civil service laws have usually not applied in this field; because public sentiment has insisted that political influences shall not control. State civil service laws will be ineffective, and in constant danger of repeal or limitation, until public sentiment insists upon high standards throughout the whole public service. Such standards as now exist depend upon a variety of forces, of which civil service laws are but one. Party organizations determine who shall fill certain appointive offices. Professional organizations of physicians and others, educational associations, and trade unions have their influence.

Permanent tenure

It is entirely proper that the heads of administrative departments should change, both in state and in nation, for they are the policy advisers of the president or of the governor and should represent, from a political standpoint, the same interests as their chief. The more important task of government is, however, that of carrying out effectively, day by day, the actual work of administration; and this does not involve matters of politics or of policy. We must develop in this country, both in nation and in state, standards of public service that will keep in office, under the heads of departments, important technical subordinates and experts who may aid in carrying on the detailed work of government effectively, and who in their positions will be loyal to the policies outlined by their administrative heads, when those heads change from one administration to another. Both in the national and in the state service, we have to some extent come, in individual cases, to recognize the indispensable character of continuous service for certain officers who are not subordinates. But we must, as far as possible, build up under the heads of departments a complete and permanent administrative organization which can effi-

ciently carry out governmental policy, and which can do this in loyalty to department chiefs of whatever party.[1]

Employment policy

Upon an efficient body of permanent employees, who may rely upon a career in the public service, depends the efficiency with which the work of government is to be done. No amount of wise policy from the head can get satisfactory results out of an inefficient organization whose members are always in fear of losing their positions and who have no hope of future advancement. Salaries of state employees are to a large extent now based on detailed legislative appropriations. An employee in one state office may receive much less than an employee doing similar work in another office; and his chief hope of salary increase often is through bringing political influence to bear upon members of the legislature. In some states, particularly in New Jersey, civil service commissions have taken steps towards introducing uniform salary standards;[2] but the states have hardly begun to develop plans for the adequate handling of employment policies. The employment problem is not a small one, for several states now have ten thousand employees each. Closely related to the employment, promotion, and control of state employees is the problem of the retirement and pensioning of public employees.[3]

State administration a unit

State administration is a single task. A mere formal consolidation of state offices does not produce unity. Each department, in order to perform its work effectively, must know what the other departments are doing. Certain central services of the state must have relations with all parts of the administration. Financial control is a single function, as is also the control of the state's

[1] For the place of experts in popular government see A. Lawrence Lowell, *Public Opinion and Popular Government* (New York, 1913).

[2] For an account of this subject see William C. Beyer, "Employment Standardization in the Public Service," *National Municipal Review*, Supplement (June, 1920).

[3] Upon this subject see Lewis Meriam, *Principles Governing the Retirement of Public Employees* (New York, 1918); and Milton Conover, "Pensions for Public Employees," *American Political Science Review*, XV, 350-365 (1921).

CHAP. X

policies as to purchases and printing, state employees, and building. The governor must have an organization that will treat state administration as a single task. With the executive department so organized, a central service may be established to prepare official reports, giving an intelligible account of what the state is doing. Voluminous reports are now published by separate state departments and offices; but in most cases they are useless to the citizen. A governmental organization that is accomplishing satisfactory results should be able to report those accomplishments simply and intelligibly.

Tests of success in government

In governmental matters we have no standards for the measurement of success or failure. Private business fails when it is unsuccessful. A public administration, when it is unsuccessful, increases taxes or issues bonds. We must obtain in our public service, through the comparison of state with state and of municipality with municipality, some sort of standards to be applied in the measurement of success or failure in the work of government. Government is not business, and can not become so. But the administrative side of government presents much the same problems as does private business, and we must develop something of definite responsibility for governmental tasks and of definite standards by which to measure the success with which those tasks are performed.

A single command

Responsible leadership in our states is most likely to come from the governor. The executive department is the one permanent organization around which an administrative responsibility and a real leadership can be developed. This leadership can not be developed by scattering authority. We can not now hold state governors responsible for the effectiveness with which governmental work is done, because they have little authority to see that this work is done effectively. With the governor actually in authority over the state executive organization, and with such a simplification of that organization that all of its

problems can be presented clearly to the state legislative bodies, legislation will be more effective and our government will be better conducted. It must be borne in mind that nine tenths of the task of legislation has to do with state and local administrative problems. With state and local administrative organizations as complex and as disorganized as they now are, state legislative bodies must necessarily, to a great extent, reflect this chaotic situation in their work.

Lines of progress

Much has been done in the field of state government in the past ten years, and much remains to be done. It is fortunate that we have awaked to the importance of the problem. Bryce was right when, in the first edition of his *American Commonwealth,* he spoke of our city government as the greatest failure in American political life. The statement does not hold to-day, because we have given attention to city affairs. While improvement can still be made, cities are not now the reproach they were thirty years ago. State governments have begun the same type of forward development. The problem of bettering state government is to a large extent bound up with that of a better organization of local government within the states. To this problem outside of cities a great deal of attention has not yet been given.

NOTE TO CHAPTERS IX AND X

More than twenty-five years ago Frank J. Goodnow began at Columbia University the systematic investigation of problems of state administration. Under his leadership a group of able students prepared studies of administration in Massachusetts, New York, Ohio, Indiana, and Iowa. Monographs were also prepared and published on centralizing tendencies in education and in liquor law administration. The results of these investigations are found in the Columbia University *Studies in History, Economics and Public Law,* and may still be consulted with profit. Monographs on recent administration in Virginia and Maryland have been published in the Johns Hopkins University *Studies in Historical and Political Science.*

There is a vast body of literature dealing with state administrative activities in particular fields. Much of this literature is referred to in Mathews, *Principles of American State Administration.* The Report of the Illinois Efficiency and Economy Committee in 1915, though now

CHAP. X

somewhat out of date, still presents the most thorough analysis of state administrative organization.

If a student of state government will chart the administrative organization of his state, he will obtain a better knowledge than can be gained by reading descriptions of organization. In preparing a chart, he will discover what commissions exist, and their relationship to departments or offices with single heads.

Reports of state departments and offices should always be used in the study of the government of a particular state. Such reports can usually be obtained without difficulty from the secretary of state. In using reports, it must be understood that in most cases they are not so informing as they might be. In many cases they add little to our knowledge. In others they seek to tell too much. Under present conditions an official report that makes an unusually good showing for an office is to be distrusted. It is too often an unverified claim by those personally interested in making the best appearance.

Students in each state should know what that state has done with respect to civil service, standardization of employment, retirement and pensioning of employees, and methods of making contracts and purchasing supplies. In the study of problems relating to public employment, use should be made of Arthur W. Proctor, *Principles of Public Personnel Administration* (New York, 1921).

CHAPTER XI

THE ENFORCEMENT OF STATE POLICY

Nature of enforcing organization

STATE policy is declared in part by constitutions; but even the longer constitutions do not affirmatively determine policies in many cases. Most constitutional provisions require legislation in order to become effective. The state legislature is, therefore, the body that determines state policy. The organization for the enforcement of state policy is complex. The state itself has developed central administrative machinery for carrying out some of the policies announced by legislative action; but it also relies to a large extent upon locally elected officers. State and local administrative machinery would amount to little, however, were courts not organized for the purpose of applying the law in individual cases and passing upon issues presented by its violation. Official prosecuting officers, who are ordinarily classed in the executive department, are necessary to the performance of judicial duties. The executive and judicial departments, while distinct in state governmental organization, are agencies for the performance of the single task of enforcing state policy. Administrative officers, state and local, have the duty of enforcing state policy, whether it relates to the prohibition of the sale of liquor, the maintenance of adequate safeguards against disease, the conservation of the state's natural resources, or any other matter. The chief means by which obedience to state policy is enforced is the imposition of civil or criminal liabilities; and the courts are the governmental agencies for the imposition or the enforcement of such liabilities.

CHAP. IX

Organization of enforcing authorities

Not only are locally elected prosecuting officers, and other local officers, relied upon to aid in the enforcement of state policy, but in most of the states the judges who try cases are also locally elected. The problem is, therefore, one of using several somewhat diverse elements for the enforcement of state policy: (1) State executive officers, some appointed by and responsible to the governor, but others popularly elected and not under the governor's control. The state attorney-general, for example, who is the prosecuting officer of the state, is usually elected by popular vote and independent of the governor, though in several states he is appointed by the governor. (2) Locally elected officers, such as the sheriff, the prosecuting attorney, and officers of city government. In the early days of some of the American state governments many of these officers were appointed by state authority, but this soon gave way to the plan of popular local election. (3) A judicial organization, composed of courts running from justices of the peace upward to the highest state court. In most of the states, judges are popularly elected; and judges of trial courts are elected by local districts into which the state is divided. Criminal cases are tried by juries whose members are drawn from the county or district in which the crime is alleged to have been committed. One of the most important problems in the field of state government is that of organizing the several factors thus concerned in the enforcement of state policy, so that this policy may be effectively carried out.[1]

Little conflict when state functions limited

So long as the state laid down little of general policy, aside from that for the preservation of peace and the punishment of crime, little conflict arose between the policy of the state on the one side and the sentiments of

[1] On some of the issues here discussed material of interest will be found in Herman G. James, *Local Government in the United States* (New York, 1921). In connection with this whole problem see Mathews, *Principles of American State Administration*, and Fairlie, *Local Government in Counties, Towns, and Villages*, Chaps. XII-XVI.

particular communities within the state on the other. So long as the state and all of its local government subdivisions were in substantial agreement upon the matters on which the subdivisions acted as state agents, it was sufficient for the legislature to announce the policy of the state, and for the courts to enforce that policy by means of criminal proceedings.[1] But this course of procedure proved ineffective when the legislature began to enact state-wide policies that were in agreement with the sentiment of most of the people of the state, but that conflicted with the views of some of the communities which were to serve as agents of the state in the enforcement of such policies. In communities which do not agree with the state's policy, that policy is likely, under such conditions, to be disregarded.[2] Locally elected officers who desire reëlection will not enforce the state policy efficiently, and perhaps will not enforce it at all; locally elected prosecuting officers will not prosecute; and, even though the courts must try the criminal cases properly brought before them, the locally chosen jurors will not convict persons accused of violating such state policies.

Varying problem in different communities

The problem of enforcement varies from one section of a state to another. The state's policy is sometimes established as a minimum, which may be exceeded by local action, and sometimes as a fixed standard. The larger cities will often maintain higher standards than those set by the state with respect to such matters as schools and sanitation. They may at the same time set higher standards as to certain matters involved in police administration, but be extremely lax in the enforcement

[1] In connection with the whole matter of control in this manner, see Frank J. Goodnow, *Principles of Administrative Law of the United States*, pp. 168-178.

[2] Such a situation is likely to lead to corruption in local police forces. If an act is prohibited and criminally punishable, it is always possible for the police to insist upon illegitimate payments to themselves as a price for inaction. Threat of arrest constitutes a sufficient basis for coercing such payments, even though there is no great possibility of indictment and conviction after such arrest.

CHAP. XI

of certain moral policies established by state law. Smaller communities may be more lax in educational and sanitary administration, while enforcing rigidly certain of the moral standards set by the state.

Local sentiment controlling state policy

Uncontrolled local enforcement of the legally enacted policy of the state results, therefore, in fact in the application of a different policy to the several communities of the state, according to their respective desires. There are many questions upon which state policy and the sentiment of the whole state agree; and in such cases an uncontrolled enforcement of policy through locally elected officers results only in such variations in different parts of the state as depend upon the varying efficiency of local officers. Even under such conditions, some supervision by the state itself is necessary to obtain the uniform enforcement of state policy, because the policy will be effectively enforced in one community and ineffectively in another. However, when certain communities of a state are inhabited by people who do not agree with the policy announced by the legislature for the state as a whole, some effective supervision over such local enforcement becomes essential in order that the policy announced for the state as a whole may actually be applied to the whole state.

Judicial power to prevent administrative abuse

The courts have a large degree of control over administrative officers. Under the English law as applied in this country, they have large powers to protect the individual from abuse of power upon the part of public officers. By mandamus, injunction, and other writs, an individual who is injured, or whose injury is threatened, by improper official action may obtain relief. This judicial control over administrative action has in many cases been extended through legislation providing for judicial review of administrative proceedings. Under the principles of English law, public officers are liable for their illegal acts, just as are private individuals. If they exceed their authority, suits for damages may be brought

against them, or they may be criminally prosecuted. The remedies here referred to are, however, judicial means of keeping public officers within the terms of the law. They are protections to the individual against official action. Their influence is almost purely negative, from the standpoint of affording a more effective and uniform enforcement of general state policy.[1] The power of the courts to protect the individual against the abuse of administrative authority has, in virtually all of the states, been extended, either by the courts themselves or by statute, in such manner that any tax-payer may bring an action to enjoin the illegal disbursement of public money. The courts, therefore, are effective instruments in preventing the abuse of administrative power, both state and local.

Courts as enforcing agencies

In the administration of criminal justice, and in the imposition of civil penalties, the courts serve as affirmative agencies in enforcing certain state policies; but in the performance of this function with respect to criminal matters they are dependent upon effective prosecution by locally elected prosecuting officers and upon the attitude of locally chosen jurors. Moreover, much of state policy can not be effectively enforced through the imposition of penalties as a result of judicial action. For example, the state enacts a general health law, and provides for the appointment by local authorities of health officials to carry that law into effect; but there is no effective means by which the courts can enforce such a state policy.

Injunction and abatement laws

However, there has been a rather material extension by statute of judicial power as a positive agency to enforce laws that lay down a general state policy. The most important developments in this field have been those arising out of the effort to enforce regulations of the liquor traffic (or the prohibition of such traffic) and

[1] For an interesting illustration of the limits upon judicial action when it comes to aiding the administration of law, see Gowan *v.* Smith, 157 Mich. 443 (1909).

CHAP. XI

other moral standards set by the state. So-called injunction and abatement laws in Iowa and a number of other states prescribe that a building used for the manufacture or sale of liquor shall be a public nuisance, and authorize certain public officers, or any citizen, to maintain a bill in equity to enjoin the maintenance of such nuisance. The court, acting as a court of equity, hears the application, and may issue an injunction. Violation of the injunction then becomes "contempt of court," punishable without jury trial. In this manner a court may, by injunction, forbid the maintenance of buildings for a certain purpose, and may punish in a summary manner the violation of that injunction. The law is thus enforced directly by the court, without the use of a jury made up of people whose views might be opposed to its enforcement. By permitting application to be made for such an injunction by any citizen, a method of enforcement is employed which is independent of the locally elected prosecuting officer.

Judicial appointment and removal of administrative officers

Some administrative officers are directly appointed by the courts. In Connecticut state's attorneys are appointed by the superior court; and local prosecuting officers are removable by judicial action in Connecticut, Massachusetts, and New Hampshire. The attorney-general of Tennessee is appointed by the judges of the supreme court. The laws of a number of states expressly provide for the removal of locally elected officers through judicial action. An Iowa law provides that the county attorney, sheriff, mayor, police officer, marshal, or constable may be removed by the district court or district judge upon charges made in writing and hearing thereon, for neglect of duty, misconduct or maladministration, corruption, extortion, conviction of felony, or intoxication.[1] Provision for the removal of public officers through judicial action has, indeed, tended to become

[1] For an application of this law see State *ex rel.* Kirby *v.* Henderson, 145 Ia. 657 (1910). See also Patton, "Removal of Public Officials in Iowa," *Iowa Applied History Series*, Vol. II.

common in state legislation. Such provision has frequently been occasioned by, or is found in connection with, the enforcement of state prohibition acts.[1] Sometimes judicial action in connection with the removal of public officers is employed, not as a means of compelling compliance with state policy, but rather as a check upon the power of removal vested in higher administrative officers. For example, in New Jersey assessors may be removed by the supreme court after a hearing on complaint of the state board of taxes and assessments.[2]

Powers of courts limited

The possibility of effective judicial enforcement of a uniform state policy is slight, for the primary function of the court is not that of controlling administrative officers; and the courts exercise the powers given to them only upon the application of somebody from outside the court itself. Courts could not, if they had the power, take a great deal of time to engage directly in the task of obtaining a uniform enforcement of state policy.

Development of state administrative control

With the increase in the things in which the state is interested and upon which it lays down a general policy, there has almost necessarily been a development in two directions: (*a*) Toward an increased supervision of local officers and local governments as agents in the carrying out of state policy; or the partial supersession of such local agencies by means of direct state action. The state, when it comes to exercise a supervision over local officers as agents for the carrying out of state policy, faces numerous areas of local government, with overlapping territories and overlapping powers. The complexity of local governmental organization, therefore, materially increases the problem of adequate state supervision over such bodies as agents for the carrying out of the policy of the state. (*b*) The development of a greater degree of direct administration by the state itself, under the

[1] See, for example, Tennessee Public Acts, 1915, Chap. II; West Virginia Code Supplement, 1918, Sec. 1305c.

[2] New Jersey Laws, 1921, p. 800.

CHAP. XI

supervision of the governor, the state in this way doing a great number of things in complete, or substantially complete, independence of locally elected officials.

Central state administration

Attention has been called in the preceding chapter to the tendency to vest in the governor of the state a greater and greater degree of control over the central state administration. In several states the governor has the appointment of the attorney-general, who is the state's law officer for the enforcement of state policy; though in much the greater number of states the attorney-general is elected by the people, and is independent of the governor's control. Under certain limited conditions, the governor is also, in certain states, given authority to remove elected state officers; and in a large number of states he is authorized to fill vacancies in such offices. In Michigan the governor may "remove from office for gross neglect of duty, or for corrupt conduct in office, or any other misfeasance or malfeasance therein, any elective or appointive state officer, except legislative or judicial, and report the causes of such removal to the legislature at its next session." However, although the governor is coming to have a much larger control over that part of the state administration created by statute, his power in most of the states is slight over the officers of the state executive department who are elected by popular vote or by the two houses of the state legislature.

Supervision over local governments

In most states some machinery has been set up by which a fair amount of direct state supervision is exercised over locally elected officers, who act as agents for the performance of the work of the state. State supervision over local finance will be commented upon in a subsequent chapter.[1]

Power to remove local officers

This more effective supervision over locally elected officers by the state itself is organized in various ways. The New York constitution of 1894 provides that the governor may remove sheriffs, clerks of counties, dis-

[1] Chapter XVI.

trict attorneys, and registrars, "giving to such officer a copy of the charges against him and an opportunity of being heard in his defense." A similar constitutional provision is found in Wisconsin. The Michigan constitution of 1908 provides that "any officer elected by a county, city, village, township, or school district may be removed from office in such manner and for such cause as may be prescribed by law." This, and similar provisions in other state constitutions, make certain that the legislature has complete power over removals. Even where no such constitutional provision is found, the legislature may have authority in the matter. Legislation has been sustained in Illinois providing for the removal of the sheriff under certain conditions, and this in spite of the fact that sheriffs are elected by the voters of their respective counties for terms expressly fixed by the constitution. The supreme court of Illinois said that "inasmuch as there were no constitutional limitations upon legislative power to regulate the manner of removing such officers, the legislature might pass a law vesting such authority in the governor." [1] Where local offices are not provided for by state constitutions, but are created by statute, a complete legislative authority exists to provide for the removal of such officers.

Illustrations of power of removal

Under the laws of North Dakota, the governor may remove county officers and mayors of cities, under certain conditions, though the removed officers may appeal to the district court from the action of the governor.[2] In Ohio the governor may remove mayors of cities,[3] and also has authority to remove any official for improper action or neglect in the enforcement of the liquor laws. The Indiana law with respect to taxation provides that "a township assessor or deputy township assessor may be removed from office by the state board of tax commissioners for incompetency, neglect of duty, or misconduct

[1] State *ex rel.* Davis *v.* Nellis, 249 Ill. 12 (1911).
[2] North Dakota Compiled Laws, 1913, Sec. 685.
[3] Ohio General Code, Sec. 4268.

CHAP. XI

in office, after five days' notice, and a hearing by said board."[1] The officer removed may have judicial review of such action. The vesting of power to remove local officers in some state authority, more often the governor, is now common, and the illustrations here given are merely typical of an active development in this respect. It is unnecessary to refer at length to the influence that the head of the state executive department may have, through the power of removal, to enforce some degree of uniformity in carrying out state policy.

Appointment and qualifications of local officers

In New Jersey the county superintendent of schools is directly appointive by the state commissioner of education, with the advice and consent of the state board of education.[2] Direct appointment of officers to perform local duties of this character has, however, not developed rapidly, and is not likely to develop. In some cases, statutes have provided for a state supervision to control the qualifications of local officers, sometimes coupling this supervision with an express power of removal as well. In North Carolina provision is made for a county superintendent of public welfare; but the statute expressly provides that "no one so elected shall begin the work of this position until he shall have received a certificate of approval of his fitness from the State Board of Charities and Public Welfare"; and, in case such approval is not received, another person is to be locally elected by the county board of education and the board of county commissioners, acting jointly. When Illinois, in 1913, adopted an act involving an effective supervision by the state over the policy of road construction, provision was made for county superintendents of highways. The county board submits to the state authority a list of from three to five persons. The state department determines, by competitive examination from among the names submitted, the person or persons best fitted for the office,

[1] Indiana Acts, 1921, Chap. 222, Sec. 7, amending section 134 of the general tax act.

[2] New Jersey Public Laws, 1913, p. 771.

and certifies the list to the county board, which then makes the appointment from among those found eligible. No moneys appropriated by the state for the building and maintenance of state roads are apportioned to any county until a county superintendent of highways has been appointed. By legislation of 1921 [1] state supervision over this officer was increased by providing that "any county superintendent of highways may be removed from office in the manner provided by law, either by the county board of his county, or by the Department of Public Works and Buildings, for incompetency, neglect of duty, of malfeasance in office."

Supervision over local charities and corrections

Alabama, in 1911, authorized a state prison inspector to inspect county jails and almshouses, and municipal jails in certain cities, and to order changes in such institutions, or the construction of new buildings, subject to an appeal to the governor. Under some conditions this officer was authorized to condemn jails, prisons, or almshouses, and to prohibit their further use. Statutory provisions of this character will be found in a large number of the states with respect to control of local charitable and penal institutions, and some use of this method of supervision has been employed in other fields of state activity as well.[2] Sometimes state statutes provide merely for the supervision of some state authority over local agencies of the state, without accompanying this authority with any effective means of controlling such local agencies, but merely with a threat of criminal penalty for violating the orders of state authority.

Control through state subsidies

One of the most effective means of exercising state control over locally elected or appointed officials is that of making the payment of state subsidies to local communities dependent upon their compliance with certain state standards or requirements. Reference has just been made to the application of this principle under the

[1] Illinois Laws, 1921, pp. 781, 782.
[2] See Mathews, *Principles of American State Administration*, p. 341.

CHAP. XI

Illinois road law. This method of supervision, as a means of carrying out a uniform state policy, has been to a large extent employed in the field of road administration, and also in the field of education. An illustration will be found in the rules of the state high school board of Minnesota, under which state aid to schools is apportioned to local communities with reference to their compliance with certain state standards.[1] Such a plan is most effective when the state refrains from payment until after the local community has fully complied with all conditions imposed.

State supervising organization

In order to carry out effectively any plan of supervising local officials as state agents, the state must necessarily build up a central organization for the exercise of such supervision. To some extent, states not only build up an organization for the exercise of such supervision, but at the same time construct machinery for doing a part of the work previously not done at all, or carried on by purely local officials.

Prosecuting machinery

In the prosecution of violations of state law, the attorney-general has in most cases some broad general authority to intervene in cases and to aid in their prosecution. Sometimes his authority extends to the point of completely superseding the locally elected prosecuting officer. However, the attorney-general, even though he possesses such powers, will be able to intervene only in occasional cases of great importance; he must necessarily leave to the local prosecuting officers the general task of law enforcement within their respective territories. There are in many states laws authorizing the appointment, either by the attorney-general or by the courts themselves, of special prosecutors for the conduct of particular cases; but such a power will be employed only in exceptional cases.[2] In North Dakota an act authoriz-

[1] For these rules see Cubberley and Elliott, *State and County School Administration*, II, 357.

[2] See Commonwealth *v.* McHale, 97 Pa. 397 (1881); State *v.* Jepson, 76 Kans. 644 (1907).

ing the appointment of enforcement commissioners, who should have all the powers of state's attorneys in the enforcement of a prohibition law, was held unconstitutional [1] on the ground that such powers are reserved to officers elected by local vote. The use of the state militia as a means of preserving order is, of course, an extraordinary procedure. The militia affords the governor no effective means of enforcing the continuous compliance with state law. There is now a tendency to increase state powers with respect to prosecutions. The Louisiana constitution of 1921 expressly provides for a state department of justice with the attorney-general at its head, and gives him some degree of supervision and control over district attorneys and their work.

Influence of prohibition

The development of state machinery for the enforcement of state policy, independently of locally elected officers, centers to a large extent around the prohibition movement. State prohibition commissioners are now provided for in a number of the states, or similar powers are vested in an existing state officer; and in many of these states express provision is made for the appointment of a number of inspectors who shall have, under state authority, a large power to enforce prohibition legislation.[2] The inspectors provided for by the Ohio act, and by similar legislation in other states, do not supersede the sheriff, municipal police, and other officers locally elected or appointed for the enforcement of the law; but rather they serve as an additional body for the enforcement, throughout the whole state, of the state prohibition law. Before the enactment of national prohibition, legislation in the state of Maine authorized the appointment of a board of enforcement commissioners, and such commissioners were authorized to appoint deputies with the same powers as sheriffs for the enforce-

[1] *Ex parte* Corliss, 16 N. D. 470 (1907).

[2] For an illustration of this type of legislation see the act passed by Ohio in 1921 for the appointment of a commissioner of prohibition.

CHAP. XI

ment of the law of that state forbidding the manufacture and sale of intoxicating liquors.[1]

State police

There has been in recent years a rapid development of state police for the purpose of aiding in the general enforcement of the laws. With the use of the automobile and of other means of rapid communication, crime has ceased to be localized; and it has been necessary for the state to recognize its obligation to prevent crime within its borders and to arrest those who are suspected of the commission of crime. This problem is one which in many of its aspects can not be effectively dealt with merely by local officers. For this reason, state police organizations have now been established in a number of states. The Massachusetts district police, established in 1865 and reorganized in 1879, performed functions of a detective character, and was also charged with the duty of enforcing certain laws of the state through inspection or otherwise. A force of state constables was created in South Carolina in 1896, for the enforcement of the state's dispensary system as a means of regulating the liquor traffic. Connecticut in 1903 organized a small group of state detective police. The Texas Rangers were organized in 1901, and similar bodies were established in Arizona in 1903 and in New Mexico in 1905. State police forces also exist in New York, Pennsylvania, Alabama, Tennessee, Michigan, West Virginia, New Jersey, Wyoming, and Colorado. South Dakota has provided for a state constabulary composed of the sheriffs and deputy sheriffs under a state sheriff appointed by the governor, and has thereby directly recognized the duty of the state in connection with the continuous enforcement of state law. A department of state police was organized in New Jersey in 1921, and Wyoming in the same year created its department of law enforcement, to assist the departments of the state government in the enforcement of

[1] Maine Laws, 1905, Chap. 92.

state law, and to coöperate with county and municipal authorities.[1]

Health administration

In some states health administration is regarded as chiefly a matter of state, rather than of local, interest. "In eleven states the central board controls the appointment of one or more of the members of the local boards or of the local health officers, and in three others it has the power of removal."[2] In several states provision is made for district health officers, appointed by state authority, who exercise a general supervision over the state health administration and coöperate with local officials. In Pennsylvania there are ten district health officers appointed by the Pennsylvania state commissioner of health.[3] Similar use of inspectors is made in New York and Illinois.

State supervision in other fields

What has just been suggested with respect to health administration also applies in a number of other fields of state administration. The state has in many fields a central state force which coöperates with local officers in the performance of specific functions. Of course there may be a group of state officers coöperating with local officers with respect to specific functions, and at the same time a state police organization for the purpose of aiding in the general enforcement of the law. Pennsylvania has not only its state police, but also its state officers, who coöperate with, and to some extent supervise, local officers in particular fields.

Work done directly by state government

No state government can do all of its work through the agency of local officers. Every such government has something of a central organization. The central state organization has steadily increased, with the increasing number of things that each state must supervise and

[1] For the development of state police in this country see a note by Milton Conover in *American Political Science Review*, XV, 82 (February, 1921). Since the publication of this note New Jersey has established a department of state police (N. J. Laws, 1921, p. 167), and Wyoming has organized its department of law enforcement (Wyoming Laws, 1921, p. 13).

[2] Fairlie, *Local Government*, p. 239.

[3] Pennsylvania Statutes, 1920, Sec. 8976.

CHAP. XI

that it must do directly. A large part of the state's central organization is created for the purpose of supervising, advising, or aiding local authorities in the performance of their work as agents of the state government. Other parts of the central state organization are established for the direct performance of state tasks, independently of local officers.

Educational, charitable, and penal institutions

All state governments have charitable and penal institutions. Reference has already been made to the fact that small communities do not have the opportunity or the facility to deal with specialized types of charity administration. The same statement applies to penal administration, and particularly to reformatory work, and to the organization of custodial care, training, and prison industries for the offenders who are committed for long periods. For this reason states have built up a large group of institutions directly controlled by officers appointed by the state government itself. In connection with the discussion of the reorganization of the state executive department, reference has been made to the fact that states, to a greater and greater extent, tend to place all of these charitable and penal institutions under a single management, and more recently under the management of a department controlled by a single officer. What has just been said about charitable institutions applies equally to state educational institutions. Most of the states have state universities and also state normal schools.

Central organization for other purposes

Education, charities, and corrections are by no means the only matters handled directly by the state government. State governments have in almost all cases officers or boards for the purpose of dealing with agricultural, labor, and health problems, and also with matters affecting the commercial affairs of the state. The state has developed a central organization for the exercise of supervision over certain types of industrial activities particularly liable to abuse, such as banking, insurance,

and the sale of securities. The state also must organize machinery for chartering and supervising corporations, for the actual administration of that part of the tax system not committed to local officers, and for the general control of state finance.

Extent to which state administration is independent

These state organizations are in a few cases sufficient to themselves, as are the state organizations for the actual management of purely state educational, charitable, and penal institutions. But in most cases there is some use of and coöperation with local officers. For example, a state office for the purpose of fire prevention will have a force of inspectors for the exercise of its powers, and will actually, through its officers, make inspections throughout the state; yet the state will rely primarily upon local officers in connection with the enforcement of state laws dealing with fire prevention. In certain fields the state government has thought it desirable to set up substantially independent forces. In a number of the industrial states, and in some of the states that are not primarily industrial, an organization of factory inspectors has been set up for the purpose of enforcing state factory legislation. The state government itself in these cases assumes the primary task of enforcing factory laws, placing substantially little reliance upon local officers; although the laws ordinarily give to local officers both the power and the duty of carrying out factory legislation. In many states fish and game laws provide for the appointment by state authority of a large number of fish and game wardens, whose primary duty it is to enforce this legislation. Here again local officers ordinarily have the power and duty to enforce such laws; but the establishment of a large state organization for the purpose of such enforcement actually relieves local officers of a feeling of obligation in the matter.

Whether or not a state has an organization that is called a "state police," it is sure to have officers who are

Organization of state's field service

doing police work in particular fields. Such officers are doing their work to a large extent throughout the whole territory of the state, rather than at the state capital. Ohio has more than three hundred and sixty persons engaged entirely or primarily in field inspectional or investigational work. State employees engaged in this type of work are in most states subordinate to numerous independent offices at the state capital, and are not so effective as they should be. Even the states that have reorganized their state administrations most thoroughly have given little attention to the more efficient use of their field employees.

Local officers still serve the state

It is necessary that local officers be used as agents for the enforcement of state law and state policy. It would be quite impossible to build up a complete state machinery for the enforcement of state law, independent of the locally elected officers. In fact, it is one of the essential characteristics of the system of American state government that locally elected officers should to a large extent be employed in the enforcement of state law, and this policy is of distinct value in the preservation of a democratic spirit, even though it costs something both in efficiency and in uniform enforcement of state policy.

State policy not consistent

Unfortunately, state policy is not consistent, but changes from one session of legislative bodies to the next. Oftentimes such changes appear to have little if any basis of reason. In order to enforce state policy more effectively through locally elected officials, a better legislative organization must be devised in order to obtain more consistent state policies. We too often lay down a state policy and do not adhere to that policy long enough to form a judgment as to its success or failure. Some policies announced by state law are in themselves unenforceable. No law can be effectively enforced, either by direct state authority or through locally elected agencies, if it clearly conflicts with the views of the people whom it affects.

It is impossible to draw any definite or permanent line between national and state functions on the one side, or between state and local functions on the other. A function local at one time may properly be taken over by the state at another; and a function local in one state may properly, because of different conditions, be exercised by the state government in another. Railroad regulation began with the states, but has properly tended to come under national control. Regulation of local utilities, such as street railroads, was at first left largely to local communities, but has tended to come under state control. In Ohio, however, the initial control in this field is left to the local community, subject to an appeal to a state commission. Although no sharp lines can be drawn between state and local functions, it can be laid down as an essential principle that a state should never take a matter under its control as one of state policy, without at the same time providing some method for the enforcement of that policy. This is constantly being done; new state policies are established by legislation, but no method for their enforcement is prescribed. Locally elected officials are theoretically under obligation to enforce the new policy, but do not, and in many cases can not, enforce it. A state would be more cautious in legislating if it knew that the enactment of such legislation involves the duty to set up enforcing machinery. It is sometimes argued that the mere legislative enactment of a policy in itself accomplishes good; but the evil is apt to outweigh the good, because encouraging the disregard of law.

Announcement of policy easy

Legislative announcement of a new policy is easy; the enforcement of the policy is often difficult. For this reason, supplemented as it is by the American passion for legislative enactment, policy announcements have outgrown policy enforcement. The difficulty is increased by the fact that the announcement of policy is made by a state body, while enforcement is too often confided to the uncontrolled discretion of locally elected officials. Al-

CHAP. XI

though the United States government to a large extent directly enforces its own legislative declarations of policy, national policy is less effectively enforced when dependent, in fact, upon independent state and local authorities, as in the case of the prohibition of the manufacture and sale of liquor.

Burdening of administrative organization

Assuming that state and local administrative organizations loyally desire to enforce all state policies, it must be remembered that their facilities are limited. Oftentimes they can not enforce all of the laws. A conscientious official must now and then decide that he will ignore certain violations of the law in order to devote his time to other violations whose effect he considers more harmful. But normally the policies that are not enforced in a particular community are those which have the least public support.[1]

Essentials of an enforcement policy

In order to obtain a more efficient and a more consistent enforcement of state policy, under the type of governmental organization in the American states, three things at least must be accomplished: (1) there must be better machinery for announcing and maintaining a consistent state policy; (2) there must be an effective organization of state supervision over the local officers who serve as agents of the state in the execution of this policy; and (3) there must be a better organization of local governing bodies that are to serve as agencies for the execution of state policy. With inconsistent and constantly changing state policies, with a central state administrative organization as ineffectively constituted as it now is in most of the states, and with a complex and overlapping series of local governing bodies, effective coördination of the agencies for the carrying out of state law and state policy is not to be expected.

Forces determining actual state policy

State policy is ordinarily announced in the form of legislative act. But the actual state policy is determined

[1] For an interesting discussion of some of the points considered above, see E. R. Keedy, "Administration of the Criminal Law," *Yale Law Journal*, XXXI, 240-262 (1922).

not merely by the legislative department, but by all the organs of the state that administer, construe, or apply the legislative act. Sometimes a legislative policy is enforced with qualifications and exceptions which make it different from that anticipated by those who announced it. A policy announced by state law may fail because of the inefficiency or neglect of state officers charged with its execution; and the state administrative organization in most states is not effectively organized for the execution of state policy. A policy announced by state law may fail because not carried into effect by local officers who, as agents of the state government, are charged with its enforcement; and it is clear that a large number of independent local officers can not be expected to carry out state policy uniformly unless they are under central state supervision and control. Not only this, but if the executive officers of both state and local government do their duty, a law can not be enforced through the use of criminal penalties, if it conflicts with the sentiment of juries drawn in particular communities, even though the courts are effectively organized for its enforcement and the prosecuting officers do their full duty. The announcement and application of general state policy depend, not upon any one department or officer of government, but upon the coöperation of the three departments of the state, and upon their relationship with the organization of local government throughout the state.

NOTE TO CHAPTER XI

Perhaps the best way to discover the relationship between state and local officers in any state is to study the development of the prohibition movement in that state. Similar studies may well be made of highway, school, and charity administration, and of the other important fields of state activity. A good illustration of such a study is John E. Brindley, *Road Legislation in Iowa* (Iowa Applied History Series, Vol. I, Iowa City, 1912). Attention should be given to the development of state police, whether known under that name or not. The state's field services should be more thoroughly studied than heretofore. In this connection some consideration should be given to the state's policy as to traveling expenses on official business.

CHAPTER XII

THE WORK OF THE STATE COURTS

The functions of courts

THE courts are specialized organs for the enforcement of law and the administration of justice. Their functions in the enforcement of the policy of the state have been commented upon in the previous chapter. In the enforcement of the state's policy the courts act to a large extent through criminal trials and the imposition of penalties; but this is by no means their only function. The state is as much interested in the enforcement of contracts between private parties as it is in the proper observation of prohibition laws; and upon its provision of proper machinery for the settlement of private controversies depends to a large extent the efficiency of the state government in the performance of its work. By state law a judicial organization is established not only to enforce criminal penalties, but also to settle issues of private right.

Changing state policies

States are constantly establishing new policies by legislation. In the field of private rights, and to some extent in public relations, legislation supplements a large body of common-law rules. With changes in social and economic conditions, states alter their policies as to private rights, just as they alter their governmental policies. Legislation has materially changed the status of women during the past century. Women have been given control over their property and earnings, as distinct from their husbands. With the influx of women into industry, a great mass of legislation has been enacted with respect to hours of labor and the conditions of women's work. Finally, women have acquired the right to vote, and have thus come into closer relationship with the organization

of the state itself. All of these are equally matters of governmental policy, though in some cases enforceable by criminal penalties and in others by civil actions. Changing policies with respect to women are but typical of what has been going on in numerous fields. State laws now regulate in detail conditions in factories, and likewise a whole group of businesses, trades, and occupations. It is an interesting and easy task to trace the influence of the automobile upon legal and governmental institutions in a single state. This influence is reflected in the administration of criminal law, the state highway system, taxation, and in the functions of the central state administration. The changes brought about by the automobile have a direct relation to the work of the courts.

Increasing work of the courts

Each new legislative policy necessarily affects the work of the courts. Almost all types of legislation increase the number of issues to be settled in the courts. An exception to this statement should be made with respect to workmen's compensation laws, which have transferred to administrative bodies the detailed task of determining rights in the first instance, leaving, however, an appeal to the courts if there is dissatisfaction with the action of the administrative body. The whole mass of legislation for the protection of labor adds greatly to the number of offenses punishable through judicial trial, as does almost every one of the new fields of governmental activity made necessary by a complicated industrial civilization, and by the congregating of people in great cities. The work to be performed by the courts in the administration of criminal law and the adjudication of private rights has steadily increased, for two reasons: (*a*) a larger population almost of necessity means at least a proportionately larger number of criminal cases, and of cases for the adjudication of private rights; (*b*) the congregating of people in cities and the development of a complex industrial civilization makes necessary a greater and greater degree of governmental

CHAP. XII

regulation, and each governmental regulation will in some manner finally present issues to the courts for settlement. The work of the courts has for this reason tended to increase more rapidly than has the population. Each new governmental activity involves not merely legislative enactment and executive enforcement, but judicial action as well. The increased complexity of legislative and executive problems is accompanied by increased burdens upon the courts. The problems of judicial administration vary from state to state, and from one part of the same state to another; for states and parts of states vary in their industrial development and in the congestion of their population.[1]

Administrative problems

With the increase in the number of issues presented to the courts, the problems of judicial administration have become materially greater. If the functions of a court were merely to pass upon an issue clearly and properly presented, and to express a judgment upon that issue, the problem would not be so difficult; but, in addition, a great mass of administrative work is involved in connection with the diverse types of cases coming before trial courts and the organization of an elaborate system of appeals. Records must be carefully kept of each step in a judicial trial. Jury lists must be prepared and juries must be impaneled for the trial of civil and criminal cases. In criminal cases, the use of the grand jury adds an element of further complexity. Modern tendencies in criminal administration involve a group of probation officers to supervise persons who are found guilty, but whom the court feels may best not be sent to prison. Modern methods of judicial administration also require the use of psychopathic laboratories. The probating of wills and the administration of estates constitute a large task. Great estates may be in a probate court for years, and every important step in their administration subject

[1] For the more serious problems in large cities with respect to judicial administration, see Roscoe Pound, "Administration of Justice in the Modern City," *Harvard Law Review*, XXVI, 302-328 (1913).

to the jurisdiction of the court. The problem here is administrative, and upon the efficiency and honesty of probate courts depends the proper handling of property of great value. The state and federal courts, through receivers and through the administration of trust property frequently coming into their hands, are performing large tasks of a technically business character. Not only this, but with the development of modern large-scale industry many of the cases coming before the courts involve complex and technical evidence, which must be carefully weighed, and which often involves the necessity for independent investigation by the court itself, either directly or through masters in chancery. The problems of judicial administration are therefore in great part not dissimilar from the problems that present themselves in the constantly enlarging and complex organization of state executive departments.

Civil and criminal cases

The work of the courts in administering justice divides itself primarily into the trial and determination of two types of cases: (*a*) civil cases, involving rights between private parties; and (*b*) criminal cases, involving proceedings brought by the state or some of its subdivisions to enforce the criminal laws of the state or ordinances enacted by subdivisions of the state.[1] A crime may be defined briefly as any act that is prohibited and punishable by government. The same act may be a crime and also give rise to civil rights between the parties. Thus if one person assaults and injures another, he will be liable to criminal trial and punishment; but the per-

[1] In this discussion no attention is paid to certain other functions of courts. Seven state constitutions require the highest state courts to render advisory opinions under certain conditions. The states having this provision are Colorado, Florida, Maine, Massachusetts, New Hampshire, Rhode Island, and South Dakota. For a full discussion of advisory opinions see Arthur R. Ellingwood, *Departmental Coöperation in State Government* (New York, 1918). Some state constitutions expressly provide that suits may be brought against the state; others that the state shall never be made defendant in the courts. Some states have set up so-called courts or commissions on claims to pass on claims against the state. For fuller discussion of this matter see *Illinois Constitutional Convention Bulletin* No. 10, pp. 864-874.

CHAP. XII

son injured will have a right to bring civil suit and to recover damages for the injury done to himself. The one act may thus give rise to two forms of proceedings. Looked at from the point of view of government, it is a criminal act and subject to prosecution; while, looked at from the point of view of the injured party, it gives rise to a civil proceeding for damages. The state assumes a definite responsibility for the trial and punishment of those violating its criminal laws. For these cases it provides not only courts, but also prosecuting officers paid from the public treasury. It does not leave to those injured by criminal acts the burden of seeing that such acts are prosecuted. On the other hand, when a person injures the private rights of another, the state provides the judicial organization through which such rights may be protected, but leaves to the private individual the burden of employing counsel and paying other expenses of the suit. In these cases it relies upon the self-interest of the individual for the enforcement of the law.

CIVIL CASES

Law and equity

In the discussion of civil cases it is necessary to distinguish between "law" and "equity." The English common law began very early in its development to become fixed and definite, so that the remedies it had developed did not always satisfactorily meet the new types of cases that were presenting themselves for settlement. For this reason there began to develop in England in the fourteenth century a jurisdiction in the royal officer termed the "chancellor" to give relief in cases where the regular courts, acting under the rules of the common law, had not developed remedies. This jurisdiction of the chancellor was at first an authority derived from the British crown to grant relief in difficult cases, where a remedy in the regular courts was not available. However, as the chancellor's authority grew from century to

century it also became more definite, and a body of legal principles termed "equity" developed. There is no logical distinction between what is termed "law" and what is termed "equity." The chief distinction is that the rules of equity developed later, and supplemented in many ways the rules administered by the common-law courts. The rules of equity were in England administered by a separate set of courts. "The result came to be that for several hundred years, embracing the whole colonial period, England had two distinct sets of courts, acting under different rules, and each trying a different kind of cases. Those involving questions of trust, account, fraud, mistake, or accident were the principal subjects of equity jurisdiction. Equity also could prevent wrongs, while law could only punish them. It was not, however, always easy to mark the line between cases, and say which belonged in the common-law tribunals and which in those of chancery."[1]

Illustrations of equity jurisdiction

Let us take several specific illustrations of this distinction. A court sitting as a law court tries suits for damages after an injury has occurred. Sitting in equity, a court will, in a proper case, issue an injunction forbidding the commission of a wrongful act. The court of equity in this instance seeks to prevent the occurrence of an injury. The court sitting as a law court tries an action for damages occasioned by an injury already committed. Both types of cases will naturally present themselves, and some judicial means of giving relief in both is necessary. Another illustration may be given. The English courts of common law developed machinery by which one party may bring a suit for damages against another party for the violation of a contract. No method was devised by the common-law courts, however, for the enforcement of the precise terms of a contract. Circumstances occasionally present themselves in which a suit for damages against the person violating his contract

[1] Baldwin, *The American Judiciary*, p. 132.

CHAP. XII

does not present an adequate remedy. For example, a contract may have been made between two parties for the transfer of a specific piece of land, and no other piece of land may be available for the use of the person who was to buy the land. Relying upon his contract, this person may have incurred a large expense, or may otherwise have put himself to serious inconvenience. Equity has developed a remedy for the specific enforcement of contracts in such cases, thus supplementing the remedy that was available in the law courts. If one has an adequate remedy available at law, the court acting as an equity court will ordinarily do nothing for him.

Distinction between law and equity

The chief practical distinction between cases at common law and cases in equity is that in a common-law case the parties have a right to trial by jury; whereas the parties have no such right in a court of equity, although the judge will occasionally call a jury in an equity case merely for the purpose of advising him. The reasons for the distinction between law and equity are purely historical. Both in England and in the majority of our states, the distinction between two sets of courts administering somewhat different types of legal rules has been done away with by statute. There remains in England, and in these states, a body of rules called the law of equity, distinct from the rules of common law; but both sets of rules are now in England, and in most of the states, capable of being administered before the same judge and in the same case. The two sets of rules remain somewhat distinct, but their administration is merged.

Distinction in application

In a number of the states, however, a sharp distinction is still maintained in the administration of the rules of equity and of common law. Six states retain the old English plan of separate courts for the trial of equity cases.[1] In these states, if one wishes a remedy that is given by the law of equity, he must go before a trial

[1] New Jersey, Mississippi, Tennessee, Alabama, Delaware, and Arkansas.

court that is independent of the courts administering the rules of common law. Here we find the old and sharp distinction that existed in England before the merging of procedure under the two sets of legal rules. In more than one fourth of the states the laws still provide for a sharp distinction between the administration of the rules of common law and the rules of equity, but do not provide for separate courts for the trial of the two types of cases. In these states an individual seeking a remedy given him by the law of equity goes to the same court as that which administers the rules of common law; but he goes to that court sitting as a court of equity. The same court administers two types of remedies, but there is no merging of the two. The same individual in connection with the same transaction may desire relief involving the application of both types of rules, but he must seek his relief before the same court in two separate and independent proceedings, and the one court is, in fact, treated as if it were two independent bodies.

Reasons for distinction

The only reason for the maintenance in many of the states of a sharp distinction in judicial administration between rules of common law and rules of equity, is the fact that these rules developed along independent lines and led in England some centuries ago to the establishment of independent courts. The plan of sharp separation between two bodies of law affecting private rights now has little to commend it; but the force of tradition is particularly strong in the legal field. Distinctions that have once developed in a legal system disappear slowly, and usually remain long after the reason for their existence has ceased.

Jury trial

In trials at common law, trial by jury is ordinarily guaranteed by express constitutional provision. A constitutional guaranty of jury trial without qualification requires a trial by a jury of twelve men, acting in the presence of a competent judge, and reaching a verdict

CHAP. XII

by the unanimous agreement of its twelve members. However, many constitutions do not guarantee such a form of jury trial.

Unanimous verdict

Important exceptions have in recent years been made from the common-law rule as to a jury of twelve members acting unanimously. Eighteen state constitutions now expressly provide for or permit a less than unanimous verdict in civil cases in courts of records.[1] A number of these constitutions provide that a verdict may be rendered by three fourths of the jury in civil cases. The constitution of Montana provides that two thirds of the jury may render a verdict. The Minnesota constitution provides that the legislature may permit five sixths of a jury to return a verdict after the jury has deliberated not less than six hours; and the laws of Minnesota permit a five sixths verdict after not less than twelve hours' deliberation. Thus it will be seen that a very material inroad has been made upon the requirement of unanimous verdicts by juries in civil cases.

Size of jury

Not only this, but a number of states have changed the number of persons required to constitute a civil jury. The constitution of Utah provides that in civil cases the jury shall consist of eight persons in courts of general jurisdiction. Seven states expressly permit their legislatures to provide for a jury of less than twelve in civil cases in courts of record.[2] In Florida the constitution provides that in civil cases the number of jurors may be fixed by law, but at not less than six; and it is provided by law that a jury of six shall be sufficient. The Virginia constitution provides that legislation may limit the number of jurors in lesser civil cases to not less than five, and in more important cases to not less than seven. The laws of Virginia provide that the jury shall consist of

[1] Arizona, California, Colorado, Idaho, Kentucky, Minnesota, Mississippi, Missouri, Montana, Nevada, New Mexico, Ohio, Oklahoma, Oregon, South Dakota, Texas, Utah, and Washington.

[2] Colorado, Florida, Michigan, New Jersey, South Dakota, Virginia, and Wyoming.

five persons in cases within the jurisdiction of justices of the peace, and of seven in cases not within that jurisdiction. In Virginia the laws also provide that the jury may be waived by consent, and that each party may select one person who is eligible as a juror, and that the two so chosen may choose another with like qualifications —the three so selected to constitute a jury. In New Jersey, Illinois, and a number of other states, a jury of less than twelve is expressly permitted, by constitutional provision, in minor civil cases.

Waiver of jury

It is a generally established principle that in civil cases at common law parties may waive a jury trial. The Texas constitution expressly provides that no jury shall be impaneled in civil cases unless demanded by one of the parties and a jury fee paid as prescribed by the legislature. The constitutions of Michigan and Utah provide that the jury shall be deemed waived in civil cases unless demanded, and a similar provision appears in the constitution of West Virginia. In Maryland the constitution expressly permits the supreme court of Baltimore to require that all civil cases in the city of Baltimore be tried before the court without a jury, unless a jury is demanded.

Defects of civil jury

The unanimous verdict of a jury of twelve in civil cases is not proving a satisfactory means of settling controversies, although this plan works more satisfactorily in small than in large communities. The requirement of trial by jury has never been recognized as essential in courts of equity, and these courts pass upon many issues of civil rights that are more important than those tryable at common law through the use of a jury. It is for this reason that many states have expressly made or authorized exceptions to the requirement of unanimous verdicts in civil cases, and that other states have altered or permitted the alteration of the number of persons necessary to constitute a jury. The defects of the jury in civil cases have also led to constitutional provisions with

CHAP. XII

respect to the waiver of jury trial unless such trial is expressly demanded. In some cases, as in the municipal court of Chicago, a jury trial in civil cases may be had only upon the payment of a fee. This requirement that a fee be paid in order to obtain a jury trial is not regarded as a violation of the constitutional right to a trial by jury in Illinois, because the circuit and superior courts exercising authority over Cook County must grant a jury trial upon demand; and the party has his option of taking the case into the municipal court or into one of these other courts. Changes that materially alter the common-law jury, or that give a greater degree of flexibility to the use of the jury in civil cases, have given satisfaction in Ohio, California, Montana, Minnesota, and in other states which have to some extent abandoned the methods of civil trial developed in medieval England.

CRIMINAL CASES

Increased work of courts

With the increase in the amount of governmental regulation, there has naturally been a great increase in the number of acts forbidden under some form of penalty. State legislation has enacted a great number of rules for the protection of the community, and has made these rules enforceable by criminal trial and penalty. Under authority vested in them by the state, cities have enacted a great mass of regulations with respect to buildings, health, and other matters, and have made these regulations enforceable by penalty. Many of the acts that are forbidden by state or municipal legislation and made punishable upon conviction are acts that are not in themselves wrongful. There is nothing in itself wrongful about the running of an automobile beyond a certain speed. However, with the increased complexity of social life and the gathering of people into large cities, a thing not in itself wrongful if done by a person remote from other individuals becomes wrongful and

punishable. There is, of course, a large body of more serious crimes, such as murder, larceny, and arson, which are in themselves wrongful and are punished by severe penalties. To these we have added a great mass of offenses not wrongful in themselves but injurious to others under present conditions of life, and prohibited under penalty for this reason. This multiplication of the task of the criminal courts through the great increase in the number and type of criminal cases has enormously increased the task of administering the criminal law. There has been no effective reorganization of the courts to meet increased duties; and, with greater duties, they have naturally become less effective as agencies to deal both with the more serious crimes and with the newer criminal offenses created for the enforcement of new public policies.

Grand jury

In most states the first step in the trial of a person for a serious offense is indictment by a grand jury. Where a grand jury is required, it is impaneled under the terms of state law, is instructed by the judge of the court in which it is to act, and has authority to summon witnesses and to present indictments against persons whom it thinks ought to be tried for criminal offense. The grand jury hears witnesses only against the accused person. Its proceedings are not a means of hearing both sides, but merely of determining whether, in its opinion, there is sufficient evidence upon which to base an indictment.

Size of grand jury

The number of members composing the grand jury varies a good deal from state to state. In Illinois the grand jury is composed of twenty-three members, sixteen of whom may transact business, but twelve of whom must concur in order to present an indictment. In Montana, Oregon, and Utah the grand jury is composed of only seven members, five of whom must unite in order to find an indictment. In no state is the unanimous consent to an indictment necessary.

CHAP. XII

Influence of prosecuting attorney

The grand jury acts under the direct supervision of the court, but it is ordinarily by law the duty of the official prosecuting officer to prepare and submit proposed bills of indictment, and to aid the grand jury in its activities. In many large urban communities the grand jury, because of its lack of independent means for the investigation of crime, has become the "rubber stamp" of the official prosecuting attorney.

Grand jury not effective

The grand jury was a useful instrument for the direct detection of crime when employed in a rural community, and composed of a group of people drawn from that community and possessing personal knowledge of crimes that may have been committed therein. The grand jury ceases to be an effective instrument for the presentation of accusations against persons accused of criminal offenses when it is drawn from a large and thickly settled community, and when its members can have little knowledge of the crimes committed in that community, and little opportunity of making investigation with respect to such crimes. However, if the official prosecuting attorney is entirely relied upon as a means of presenting accusations, this official may occasionally hesitate to act because the accused is powerful and influential or is a friend of the official prosecutor. There are some cases in which a body of representative men drawn from the county as a whole may be better fitted to act than a prosecuting officer or the court itself; but such cases are infrequent and do not require the continuance of the grand jury as the chief means of making accusations and of bringing to trial persons accused of crime.

Constitutional requirements

A number of state constitutions have no provisions requiring indictment by a grand jury.[1] Others either require or permit indictments by a grand jury in criminal cases or in certain types of criminal cases. A few states require indictment by grand jury only in capital

[1] Georgia, Kansas, Maryland, Massachusetts, Michigan, Minnesota, New Hampshire, Vermont, Virginia, and Wisconsin.

cases, or in cases where the punishment is imprisonment for life. In several states, including Illinois, the legislature is given power to retain the grand jury or to abolish it altogether. In Illinois the legislature is also permitted to do away with the grand jury in all cases in which the punishment is by fine or by imprisonment otherwise than in the penitentiary, and similar provisions are found in a number of other states. In several states[1] the legislature is authorized to change, regulate, or abolish the grand jury. Constitutions in some other states expressly provide that criminal cases may be prosecuted by information as well as by indictment.

Indictment and information

It is clear that the use of the grand jury is not so common in the American states as it was a number of years ago. The grand jury is needed for the investigation of particularly flagrant cases of the violation of law, in which the official prosecuting attorney may be unwilling to proceed; but a grand jury is needed only in occasional instances. Where a grand jury is not employed, prosecution is begun upon the basis of an "information." "Indictment" and "information" are merely methods of presenting criminal charges to a court for trial. The term "information" is used to designate the presentation of such an accusation by the prosecuting officer, or as a result of proceedings before a court in a preliminary hearing. In Arizona, California, Idaho, Montana, Oklahoma, and Utah no information may be presented until the accused person has been examined and committed by a magistrate in a preliminary proceeding. In several of the states in which both information and indictment may be employed as a means of presenting a person for criminal trial, a grand jury may be called upon the order of the judge of a court having power to try and determine felonies. A provision to this effect is found in the constitutions of Arizona, Idaho, Missouri, Montana, Oklahoma, and

[1] Colorado, Nebraska, North Dakota, and Wyoming.

CHAP. XII

Utah. In Oklahoma a grand jury may be convened by the judge upon his own motion; and one must be assembled upon the filing of a petition signed by one hundred resident taxpayers of the county. A number of the states whose constitutions do not require the use of a grand jury provide that a grand jury may be assembled at the discretion of the judge.

Reduced use of grand jury

There has been a definite tendency to reduce the use of the grand jury; although Oregon in 1908 substituted indictments by grand jury for informations. There has, however, been little tendency to abolish the grand jury altogether, for while informations have been regarded as sufficient for ordinary use, it has been thought that a grand jury may be worth while as an instrument to meet occasional emergencies in the administration of criminal justice. In the states that have practically discontinued the use of the grand jury for ordinary criminal cases, this plan seems to have worked well. In Michigan, where no grand juries are impaneled except upon order of the circuit court, apparently not more than a half dozen grand juries are called in the course of a year, although the state has more than eighty counties; and grand juries, when called, are apparently not regarded as of great use. In Seattle, Washington, it has become customary to call a grand jury once a year; but in the smaller counties of Washington such a call is infrequent. A former district judge of Idaho reports that two grand juries were used during his twelve years of service.[1]

Jury trial

Trial by jury is required by constitutional provisions to a much greater extent in criminal cases than in civil cases. A unanimous verdict of a jury of twelve is required by all states in capital cases. In felonies—that is, in the more serious criminal cases[2]—a unanimous

[1] Upon the whole matter of grand juries see *Illinois Constitutional Convention Bulletin* No. 10, on "The Judicial Department, Jury, Grand Jury, and Claims against the State," pp. 828-836.

[2] The more serious criminal offenses are ordinarily termed "felonies" and less serious criminal offenses "misdemeanors." The line between

verdict is required in all states except Louisiana. The Louisiana constitution provides that cases in which the punishment may be at hard labor shall be tried by a jury of five, all of whom must concur to render a verdict; and that cases in which the punishment is necessarily at hard labor shall be tried by a jury of twelve, nine of whom concurring may render a verdict. In capital cases the unanimous verdict of a jury of twelve is required. In Utah capital cases are tried by a jury of twelve men, but eight constitute a jury in all other cases; and in Virginia a jury of less than twelve is permitted where punishment is not by death or confinement in the penitentiary. Several states permit a jury of less than twelve in inferior courts. The constitutions of Oklahoma and Texas provide that three fourths of the jury may render a verdict in criminal cases below the grade of felony; and the constitution of Montana provides that in similar cases two thirds of the jury may render a verdict. The constitution of Idaho permits the legislature to provide for a two thirds verdict in misdemeanors. One of the difficulties in connection with jury trial in criminal cases has been that arising from the death or illness of a juror during trial, where the constitution or the law requires a unanimous verdict of twelve persons. The constitution of Texas meets this difficulty by providing that "when pending the trial of any case one or more jurors, not exceeding three, may die or be disabled from sitting, the remainder of the jury shall have power to render a verdict." By statute in some states an extra juror is provided for such a contingency.

Reasons for change

It is natural that fewer changes should have been made in the jury for the trial of criminal cases than in

felonies and misdemeanors, however, is drawn at different points by the laws of the several states, so that no definition of these terms can be given that would be applicable throughout the country. A common distinction between felonies and misdemeanors is that found in the laws of Illinois, which provide that a felony is an offense punishable with death or by imprisonment in the penitentiary, and that every other offense is a misdemeanor. In order to understand this definition it must be stated that imprisonment for one year or more must ordinarily be served in the state penitentiary.

CHAP. XII

the same institution for the trial of civil cases. A large part of the struggle for constitutional rights, both in England and in this country, has revolved around the use of the jury in criminal cases. The jury has been regarded as one of the bulwarks of individual liberties, both in civil and criminal cases, since its full establishment as an institution of English law. Yet, the unanimous verdict of a jury of twelve men has ceased to be an effective instrument of criminal justice under modern conditions, and changes have in a number of states already been made because of this situation.

Courts do not take initiative

Neither in the trial of civil nor of criminal cases do the courts take the initiative. They proceed in civil cases upon issues brought to them by one of the parties; and in criminal cases they act upon accusations brought either by indictment or by information. The effectiveness of the courts as organs for the enforcement of criminal law depends not merely upon the procedure in the court itself upon the trial of an accused person, but quite as much upon the effectiveness of the officers whose duty it is to arrest offenders; upon the effectiveness of the machinery committing accused persons to await indictment or information; upon the machinery of indictment or information for the presentation of formal charges against the accused; and, finally, upon the effectiveness of the organization provided for the prosecution of the accused person.

Preliminary hearing

The machinery for arresting persons accused of crime is located primarily in the executive department, and has been discussed to some extent in the preceding chapter. After the arrest of a person who is thought guilty of a criminal offense, the first step is usually to take the accused person before an inferior judge (generally a justice of the peace) for a preliminary hearing to determine whether he shall be held for further action. The machinery for committing persons to await further action is not satisfactory. In most parts of the country

it rests in the hands of justices of the peace, who are usually unskilled in the law, and who ordinarily have in their preliminary hearing little or no aid from skilled counsel representing either the state or the accused. Justices of the peace have been replaced in some larger urban communities, and a more effective organization established for the preliminary hearing of persons accused of crime.

Coroner

The office of coroner runs well back into English history. Its historic function is the holding of preliminary investigations in cases of violent death, largely for the purpose of determining whether a crime has been committed. The office continues in most parts of this country, and its chief function is still that of holding inquests on the bodies of persons who are supposed to have come to their deaths by violence or other unnatural means. The inquest is usually held in view of the body, by a jury of six, summoned by the coroner. In many states the coroner's inquest is not regarded as a judicial proceeding. The work of the coroner as an aid in the administration of criminal justice has, with the change in social and industrial conditions, become useless; though the office continues in many states as a constitutional office, with the incumbent elected by the voters of the county. To replace the coroner, Massachusetts and Maine both provide for the appointment by the governor of medical examiners in each county. In Louisiana coroners are required by the constitution to have a medical or surgical education. For New York City, the coroner was in 1915 replaced by a chief medical examiner. The office is one that may well be abolished, in the interest of a more efficient administration of criminal law.

Prosecuting officers

In the prosecution of offenses, the courts are almost completely dependent upon the aid of official prosecuting attorneys, who are styled by different names in different states. Usually this officer is elected as a county officer. In Connecticut he is judicially appointed. In some

CHAP. XII

states he is styled "state's attorney," in others "district attorney," and in others he is known by still other titles. The theory of American law is that the prosecuting attorney is an officer to prosecute offenses against state law, and that it is his function to protect the interests of the accused person as well as the interests of the state. It is also a theory of the law that it is the duty of the judge to protect the rights of the accused. The official prosecuting attorney is, however, almost of necessity an officer who presents the case for the state, and for the state alone. Usually the prosecuting attorney of a large community is seeking by the effectiveness of his prosecutions to create a further political career for himself, and has neither the time, the opportunity, nor the inclination to look after the interests of the accused person.

Attorney-general

The attorney-general of the state has important duties with respect to the administration of the criminal law; and in a number of states he has authority to appear and aid the locally elected prosecuting attorneys. In many cases he also has authority to appoint special prosecutors who may altogether replace, in particular instances, the local prosecuting attorney. The constitution of Louisiana requires the attorney-general to "exercise supervision over the several district attorneys throughout the state." By statutes in a number of states, courts have also been authorized to appoint special prosecuting attorneys in particular cases, either upon the application of the official prosecuting attorney, or when they have reason to believe that the elected official will not adequately prosecute the particular issues presented.

Power of official prosecutor

Although his legal power is by no means complete, the official prosecuting attorney has, in fact, the control of the state's interests, once an indictment or information has been presented. Indictments and informations are to a large extent also under his control. After

indictment or information a criminal case is in the hands of the court; and ordinarily it may not be discontinued without the court's consent. However, the official prosecuting officer of the state may delay the bringing of a case to prompt trial, and if he thinks proper he may recommend to the court that a case be "*nolle-prossed.*" That is, he files what is termed a *nolle prosequi* announcing that he will proceed no further. A court may proceed further if it desires, and may decline to enter the *nolle prosequi;* but in the prosecution of cases the courts as now organized are virtually at the mercy of the state's prosecuting officers, although they in exceptional cases take further steps. It is for this reason that the effectiveness or ineffectiveness with which the law is enforced depends fully as much upon the state's prosecuting officers as it does upon the courts.

Public defender

Although in theory the rights of an accused person are protected by the prosecuting officer, and by the court, it is natural that the office of a prosecuting attorney should devote itself primarily to the effort to convict, and that little attention should be paid to the rights of the accused except as such rights are presented by counsel for the accused himself. This situation is sought to be met in part by the court's assigning counsel to the accused if he has none, but assigned counsel, serving without pay, are frequently inefficient and careless, and do not effectively protect the rights of a poor person tried for a criminal offense. For this reason several states have enacted laws expressly providing for the office of public defender. The state, having set up an office to prosecute persons accused of criminal offenses, also in this manner sets up, or authorizes the setting up of, a public office whose function it is to defend those accused of criminal offenses and who are not able adequately to prepare their own defense.[1]

[1] A full discussion of the office of defender in criminal cases will be found in Reginald Heber Smith, *Justice and the Poor,* Chap. XV, Carnegie Foundation for the Advancement of Teaching, Bulletin No. 13 (1919).

Criminal prosecution and the individual

An individual injured by a criminal act is forbidden by law to enter into an agreement not to prosecute. The criminal offense is a violation, not only of the rights of the individual but of the laws of the state as well, and the state is interested in its prosecution and punishment. Criminal offenses fall into two groups: (1) those whose commission does not injuriously affect another specific individual, as the failure to make a required official report, and (2) those whose commission injuriously affects another specific individual, as an assault and battery. Whatever may be the theory of the law, the attitude of the injured party in fact largely determines whether there shall be prosecution in this second class of cases, and how effective that prosecution shall be, although this attitude is not highly influential in flagrant and notorious cases. Prosecuting officers are naturally less apt to push a case vigorously if the injured person (who in many cases must be the chief witness against the accused) is lukewarm or disinterested. The prosecuting officer is also, as a matter of course, likely to be more interested in the cases that he regards as important from the point of view of his position in the local community. Certain types of offenses are vigorously prosecuted, not so much because of the personal interest of the prosecuting officer as because certain unofficial organizations are interested in their punishment. Offenses affecting injuriously the interests of banks and bonding and insurance companies are likely to be vigorously prosecuted. The administration of the criminal law is, and always will be, subject to some of the influences that control the actions of individuals in other spheres. Precise equality of treatment is no more possible in the administration of criminal justice than in other human affairs. But the agencies of judicial administration are now so uncoördinated that great inequality necessarily results. One person may be

See also *Journal of Criminal Law and Criminology*, XII, 490 (1922); California Laws, 1921, Chap. 245; and Connecticut Public Acts, 1921, Chap. 121.

prosecuted and severely punished for an offense, while another equally guilty person altogether escapes prosecution.

Probation

In connection with the administration of criminal law, mention should also be made of the machinery set up for supervising accused persons who are found guilty and released on probation. This type of machinery is now provided in a large number of states. An accused person is found guilty of an offense; but it is a first offense, or there are mitigating circumstances, and it is thought that justice may best be done by releasing the person under the supervision of the court, rather than by committing him to jail or prison. Probation officers are provided for exercising such supervision, and further proceedings may be taken as to the convicted person if he violates the conditions of his probation.

Parole and pardons

After a person is convicted and committed to prison under sentence, some form of state governmental machinery is necessary for determining whether there should be commutations, pardons, or reprieves.[1] Not only this, but the development of criminal administration in this country has been steadily in favor of a system under which a person imprisoned for crime may, under certain conditions, be released upon parole after he has served a certain part of his sentence. The release upon parole under such conditions is a release subject to supervision, and subject to the reimprisonment of the person if he violates the conditions under which he is released. For the administration of pardons and paroles express provision is made in all of the states, either by constitution or by statute. It is common to vest the power of pardon, reprieve, or commutation in the governor, although many states provide that the governor shall act with the advice of a board constituted for this purpose, or shall act merely as one member of such a board. The functions of pardon and

[1] See *Massachusetts Constitutional Convention Bulletins,* I, 137, "The Pardoning Power."

CHAP. XII

parole, like those of prison administration, are primarily controlled by the executive department, but must be referred to here in order that we may have a complete picture of the administration of criminal law.

Penalties

State laws create a great number of criminal offenses, and provide in most cases detailed penalties for such criminal offenses. Legislatures, session after session, add to the number of such offenses; and usually the punishment imposed upon one offense is fixed without reference to those previously imposed for similar offenses. On this account there has grown up a serious inequality in the penalties imposed by statute for criminal offenses. There has been an increasing tendency to vest in the courts a large discretion in the imposition of penalties, the statutes in many cases fixing the maximum and minimum. However, there has been no adequate study of the types of penalties that should be imposed, and little standardization in this field, either in the statutes or on the part of judges in the exercise of their discretion. The penalties imposed for similar offenses have, therefore, to a large extent rested in the arbitrary discretion of the legislature, when the legislature has fixed a rigid penalty; or in the arbitrary discretion of the judge, when the judge has a wide range of judgment in the matter. One of the important needs in the administration of criminal justice is that for a greater standardization of penalties to be imposed upon persons convicted of crime.

PRACTICE OF THE LAW

Legal profession

In discussing judicial organization, some attention should be given to the practice of the law. Every lawyer is an officer of the court, and all of the states prescribe conditions for admission to practice. As officers of the court, lawyers appear in civil cases to represent the parties at issue. As a lawyer, the official prosecuting attorney appears in court for the state, and the lawyer

representing the accused appears for the defense. In case an accused person is unable to employ a lawyer, counsel is assigned by the court, and lawyers are under obligation to accept such assignments. The policy of assigning lawyers to defend accused persons who are unable to employ counsel is unsatisfactory, and it has already been suggested that there is a tendency to provide public defenders for the conduct of such cases on behalf of the accused person. Upon the honesty and efficiency of the members of the legal profession depends, to a large extent, the efficiency with which justice is administered. The administration of justice has, through centuries of the development of English law, become burdened with a great mass of technicalities which involve both expense and delay and which, through expense and delay, result in substantial denial of justice in many cases. The legal profession of the present day, while not responsible for the technicalities in legal procedure that have developed through the centuries, is none the less charged with the duty of bringing about such an adjustment of judicial organization and legal procedure to the needs of the present day as will insure a prompt and efficient administration of justice.

NOTE TO CHAPTER XII

Students of state government in a particular state may without difficulty discover the relationship between the rules of law and equity in that state, the use of the grand jury and of the jury in civil and criminal cases. They may also without difficulty investigate the position of the office of coroner. Parole and probation systems should be investigated in each state, particularly their practical operation. The requirements for admission to practise law vary in the several states, and should be investigated in each. There has been a recent tendency to provide by law for the incorporation of members of the state bar, and to impose certain legal obligations upon such an organization. Upon the practice of the law and training for the legal profession, much information may be obtained from a recent bulletin of the Carnegie Foundation for the Advancement of Learning, on *Training for the Public Profession of the Law* (New York, 1921).

In this chapter little attention is given to the subject of claims against the state. Attention is called to the fact that in some states such claims are determined by the courts. The method of presenting

and determining claims against the state should be more thoroughly investigated.

The subject of advisory opinions is an important one in some states, and may be studied through Ellingwood's *Departmental Coöperation in State Government*.

In the text of the preceding chapter no attention has been paid to numerous non-judicial functions that are imposed upon state courts. Such functions often relate to the appointment of certain types of officers. Some reference to this matter will be found in Chapter XI. Courts are organized as bodies for the administration of justice, and their chief functions are usually interfered with by placing upon them functions having no direct relationship to this work.

CHAPTER XIII

THE ORGANIZATION OF STATE COURTS

OUTLINE OF THE JUDICIAL SYSTEM

Constitutional provisions

TO a greater and greater extent the details of state judicial organization have been provided in the constitutional text. This development makes the process of changing judicial organization more difficult. In some states there is a very large freedom of legislative action with respect to judicial organization, and in the others the legislature has some discretion with respect to the matter; but changes in judicial organization must come largely through constitutional change.

State systems

Judicial organization varies so widely from one state to another that to give a complete picture of the organization of state courts would substantially require a separate and detailed discussion of each state. However, in certain broad essential elements all of the states are in agreement, and it will be sufficient to outline generally the type of organization that the states have built up for the performance of the task of administering justice.

Generally the states have courts of three types:

Justices of the peace

(1) Justices of the peace having a certain limited and inferior jurisdiction in both civil and criminal cases. Justices of the peace are ordinarily elected from towns or townships or from districts created for the purpose within the county; though, while elected from only a part of the territory of the county, they usually have a jurisdiction extending throughout the whole county. Justices of the peace usually receive payment only from the fees that they collect; although in Washington justices of the peace in incorporated cities or towns

CHAP. XIII

having more than five thousand inhabitants have been placed on a salary basis, and a similar plan has been adopted for the larger communities of California. The jurisdiction of justices of the peace is strictly limited by statute, and their courts are not courts of record. Appeals are allowed from their action to a court of general trial jurisdiction; and ordinarily the trial in the higher court is a trial *de novo;* that is, the actual trial before the justice of the peace is ignored and the trial in the higher court is conducted as though no proceedings had previously taken place.

Trial courts

(2) There are in all states courts of general trial jurisdiction. This trial court is sometimes called a district court, sometimes a circuit court; and in some states it is known by still a different name. This intermediate court of general trial jurisdiction has ordinarily a general authority to try all cases in law and equity. In some states, as in California, Arizona, and Ohio, the court of general trial jurisdiction is organized upon a county basis, and there is a separate court for each county. The more common plan, however, is to have the court of general trial jurisdiction go on circuit from one county to another, at least in the smaller counties of the state.

Supreme court

(3) There is in all cases a highest state court, whose function is chiefly that of hearing appeals from the courts of general trial jurisdiction. This court is ordinarily termed the supreme court; but in Kentucky, Maryland, and New York is called the court of appeals, and slightly different names are used in several other states. The highest court is usually given some original jurisdiction, but ordinarily this original jurisdiction is small, and its use is strictly limited by the court itself, in order that time may be available to hear appeals from other courts.

Municipal court

Once these three features are outlined, state judicial organization becomes to a large extent a mass of diversities. In many larger communities a municipal court has

been organized, which not only replaces justices of the peace, but is granted a much more extended jurisdiction than has ever been conferred upon justices of the peace. Municipal courts so established in large communities have ordinarily been provided with a number of judges. These courts have also, to some extent, copied the plan, first adopted in connection with the municipal court of Chicago, of having a permanent chief justice with a large degree of supervision over the work of the court and of the associate judges. Through a single centralized court for these communities, there has been a possibility of organizing special branches for the handling of particular types of judicial work. It should not be understood, however, that these municipal courts, although often given broad jurisdiction, replace all of the other trial courts within their territory. Within the city of Chicago, for example, the municipal court of Chicago has a rather broad jurisdiction, but the circuit and superior courts of Cook County (of which the criminal and juvenile courts are really adjuncts) exercise authority as the trial courts of general jurisdiction; and the individual in many cases has an option as to the court in which his case shall be brought. In addition there are the county and probate courts of Cook County.

County court

In most of the states there is also a so-called county court, with some jurisdiction both civil and criminal, and also usually a fairly large authority with respect to rather distinctly administrative matters, such as those relating to county affairs, elections, and charities. Where county courts exist independently of the court of general trial jurisdiction, they are often vested with authority in probate matters as well. Some authority is essential for the handling of the probate of wills and for the administration of estates. This type of work is largely administrative in character, and in many smaller communities is handled by a county court or a court of similar jurisdiction. However, in larger communities

CHAP. XIII

probate work becomes so extensive and important that it is thought necessary to create a separate court for this purpose. Provisions as to probate matters which exist in Illinois are not unusual. In that state every county of less than 70,000 inhabitants has its probate work handled by the county court; but when its population exceeds 70,000, a separate probate court is created for this purpose.

Juvenile courts

There are also other types of trial courts with special jurisdiction. Juvenile courts have been created in a number of the larger cities. These courts are sometimes independent bodies, although in many cases the juvenile court is substantially a branch of an existing court. This is the case in Chicago, for example, where the juvenile court is presided over by one of the judges of the circuit court designated for that purpose. In some cases there are separately organized criminal courts, although ordinarily criminal jurisdiction is exercised by the courts of general trial jurisdiction.

Increase in appellate work

The state judicial organization has placed great emphasis upon appeals from lower to higher courts. No case of any importance is regarded as settled until it has been taken to the highest court. Each state has at the head of its judicial system a court which is ordinarily termed the supreme court; but increased complexity of appellate court organization has been forced by the growing number of appeals to be heard. The increased mass of appellate work has been handled in three ways: (*a*) by increasing the number of judges of state supreme courts; (*b*) by authorizing such courts to sit in sections or divisions; and (*c*) by creating intermediate appellate courts, standing midway between the trial court of general jurisdiction and the highest court.[1] Where a state supreme court is authorized to sit in sections, provision is ordinarily made that all of the members of the court

[1] For details as to this development see *Illinois Constitutional Convention Bulletin* No. 10, on "The Judicial Department," pp. 806, 807.

shall sit in a single body for the hearing of certain important cases, or in cases in which there is substantial disagreement in one of the sections.

Problems vary from state to state

In order to discover the detailed problems with respect to judicial organization in any state, and the method by which it has been sought to meet these problems, it is necessary to study each state separately.[1] Little can be said in the way of generalization as to all of the forty-eight states that will be true as to any one of them. The statements here made are perhaps sufficient, however, to indicate the general framework of state judicial organization and the manner in which efforts have been made to meet the increasing burdens of judicial administration.

Multiplication of judges and courts

In the main, states have sought to provide for the increased mass of judicial work by multiplying the number of judges and by creating additional courts. When judicial work becomes too heavy for the existing organization, the chief demand is for an increase in the number of judges, or for some other purely mechanical adjustment between the mass of work and the number of persons provided to do that work. Different types of state courts have usually been created without much reference to the other courts which occupy the same field and which to some extent may have the same jurisdiction. With the multiplication of judges and the increase in number of courts, no serious effort has usually been made to study the judicial problem and to meet it through a carefully planned and coördinated state judicial system.

Organization of appeals

The organization of appeals may be said to approach most nearly to an effort at planning the work. In general, where a state has created an intermediate

[1] The Illinois constitutional convention bulletin referred to in the preceding footnote gives a careful analysis of judicial organization and problems in Illinois. For Massachusetts much information may be obtained from the Second and Final Report of the Judicature Commission (Boston, 1921).

CHAP. XIII

appellate court in order to relieve the burdens of its highest court, the intermediate court has been given substantially final jurisdiction in a large mass of cases. In this way an effort has been made to apportion the burden of appeals between the two. However, there has been little of systematic planning as to the relationship between an intermediate court of appeals and the highest state court; although provisions of law are usually made by which it is possible to obtain the final decision of the highest state court upon any new issue of great importance.

Temporary courts and judges

In some states efforts have been made by constitutional and statutory provisions to meet the increasing burden of appeals by providing for temporary additional judges, or for additional courts to be temporarily created. In New York the constitution provides that "whenever and as often as a majority of the judges of the court of appeals shall certify to the governor that the said court is unable by reason of the accumulation of cases pending therein to hear and dispose of same with reasonable speed, the governor shall designate not more than four justices of the Supreme Court to serve as associate judges of the Court of Appeals." In Virginia constitutional provision is made for a special court of appeals in such cases; and the Ohio constitution provides for the appointment of a commission of five members, upon the application of the court, to aid it in catching up with its work. By statute in many states, commissions have been temporarily created for a similar purpose.

CHOICE OF JUDGES

Methods in use

The method of choosing judges is one of the most important issues with respect to judicial organization. Under the first state constitutions the tendency was to have judges chosen by the legislature. There are now three methods of selecting judges in the United States:

(*a*) In thirty eight states, judges of the highest court are elected by the people. In all of these states except one the trial judges are chosen in the same manner. In Florida the trial judges are appointed by the governor, although the judges of the supreme court are popularly elected. (*b*) In four states[1] the judges are elected by the legislature; and in one[2] they are appointed by the legislature upon the nomination of the governor. (*c*) In five states the highest judges are appointed by the governor, subject to confirmation by the governor's council in Maine, Massachusetts, and New Hampshire, and to confirmation by the Senate in Delaware and New Jersey. Certain inferior judges in other states are also appointed by the governor.

Merits of plans

There has been much argument as to the respective merits of different methods of selecting judges. It is generally agreed that election by the state legislature is unsatisfactory, and there is no tendency whatever to enlarge the number of states that provide for this method of choice. The issue is that between executive appointment and popular election, and the great weight of printed argument is in favor of executive appointment. Nevertheless, there has been a steady tendency in the direction of electing judges by popular vote; and as far as can now be seen the judges in the great bulk of the states will continue to be so elected.

Judges in metropolitan districts

Where a large number of judges are to be chosen by the people within a given territory, the problem of election is quite different from that in which but one or two judges are to be so chosen. The people of Cook County, for example, elect twenty circuit and twenty superior court judges, one county judge and one probate judge; and the people of Chicago not only vote for these forty-two judges, but also for thirty-six municipal court judges and one chief justice of the municipal court. In

[1] Rhode Island, Virginia, South Carolina, and Vermont.
[2] Connecticut.

CHAP. XIII

addition, the voters of Chicago and Cook County once each nine years participate in the choice of a justice of the state supreme court. Popular election is here used for the choice of seventy-nine judges; and though popular choice may work with satisfaction for a smaller group of judicial offices, it to a large extent breaks down when such a heavy burden is placed upon the voters. On this account the American Judicature Society has suggested, with respect to metropolitan areas, that a chief justice be elected, and that he appoint the other judges, on the condition that all judges should at regular intervals be subject to a popular vote as to whether they shall be continued in office. This method of selecting judges is not dissimilar from the method followed in the selection of vice-chancellors by New Jersey, where the chancellor is appointed by the governor and is given power to appoint vice-chancellors. The New Jersey system has worked satisfactorily.

Method of choosing supreme court judges

In the states that elect the members of their highest court by popular vote, such members are chosen in several different ways. In one group of states the state is divided into districts, and the voters of each district elect one or more judges. In another group of states the state is divided into districts and one judge is elected from each district by the voters of the state at large. In the third group, which includes much the larger number of the states, the judges of the highest court are elected from the state at large by the voters of the entire state.

Terms of judges

The terms of office of judges vary a good deal from state to state, and also within a particular state. Where the judges are elected by the people, the terms of those forming the highest court range from four to twenty-one years. The longest terms are: Pennsylvania, twenty-one years; Maryland, fifteen years; New York, fourteen years; California, Louisiana, and West Virginia,

twelve years; Missouri and Wisconsin, ten years. In seventeen states the term is six years. In the four states where the highest judges are elected by the legislature, the term is for life in Rhode Island, twelve years in Virginia, ten years in South Carolina, and two years in Vermont. In Massachusetts and New Hampshire the judges of the highest court are appointed for life; in Delaware for twelve years; in Connecticut for eight years; in Maine for seven years; and in New Jersey for six years. In most of the states trial judges are chosen for shorter terms. The situation as to judicial tenure in Illinois is not dissimilar from that in many other states. In this state, justices of the peace and the probate, county, and city judges hold their offices for a term of four years; the municipal court judges of Chicago, the superior court judges, and the circuit court judges for a term of six years; and the supreme court judges for a term of nine years. The advocates of long terms contend that such tenure tends to make judges more impartial, since it frees them from the necessity of seeking frequent reëlection; and that it tends to produce a stronger bench because it gives the judges greater opportunity to learn judicial duties and to gain experience. It is clear that, unless there is some policy of reëlecting judges as long as they have performed their duties satisfactorily, short terms tend to produce a less efficient judicial system.

Non-partizan elections

In general, however, it may be said that the states have organized their judicial system upon a basis of electing judges for relatively short terms by popular vote. In view of this fact, and of the undesirability that partizan issues should play a large part in judicial elections, a number of states have provided for the non-partizan nomination and election of judges. In Wisconsin, for example, no party designations are permitted on ballots for the election of judges, and the elections take

place at a time when no bitter party contests are likely to occur.[1] Iowa provided in 1913 for a non-partizan primary and for the non-partizan election of judges; but the plan worked unsatisfactorily because primaries and elections were held at the times of party contests over other offices. In some states express provision has been made for the election of judges at a time different from that of the general elections. In Illinois, for example, judges of the supreme and circuit courts are chosen at elections in June of certain years, and are thus removed to some extent from the more distinctly political issues presented in general elections. The policy of popular election of judges works best where a tradition has been built up in favor of returning judges to office, irrespective of their political affiliations, as long as they perform their duties satisfactorily, and where in the original choice of judges an effort is made to limit nominations strictly to those who have by their careers demonstrated distinct capacity for judicial duties. In Wisconsin a definite policy has been built up by which candidates for judicial office are substantially nominated by the members of the bar, who may be expected to be most familiar with the qualifications of their associates; and a person once elected is continued in office without contest if his services are well rendered. Such a policy has unfortunately not been established in many states, though in the Illinois judicial elections of 1921 satisfactory sitting judges were returned to office in a number of the circuits without political contest. The plan of non-partizan nomination and election, which has for some time been employed in Wisconsin and Minnesota, appears to have taken judges to a large extent out of the contests between political parties, and thus to have taken a step in the direction of freeing judicial positions from purely partizan influences.

[1] Similar plans will be found in Minnesota, Nebraska, South Dakota, and Idaho. Pennsylvania in 1921 repealed a plan for non-partizan election of judges.

Much may be said for the appointment of judges for a long term by the governor, and executive appointment has worked well in the states employing it. Some method of appointment may become necessary in large metropolitan areas; but so far as can now be determined, little is likely to be accomplished by a movement for the general establishment of executive appointments. More fruitful results are likely to come from efforts to operate the elective system more satisfactorily and to establish a tradition in favor of electing and retaining competent judges. An apparently bad system can often be made to yield satisfactory results. Judges of the supreme judicial court of Massachusetts are appointed by the governor during good behavior; judges of the Wisconsin supreme court are popularly elected for ten-year terms; and judges of the Vermont supreme court are elected by the legislature for two-year terms; and yet, to an almost equal extent in these three states, the continuous service of competent judges has been obtained.

Operation of various methods

The methods of removing judges are in some respects equally as important as those affecting judicial election and tenure. All of the states provide for the removal of judges and certain other officers by impeachment. Impeachment, however, involves the bringing of formal charges by one house of the legislature, and a formal trial of those charges by the other house, with a removal from office in case an extraordinary majority of the house trying the impeachment finds the accused person guilty.[1] Impeachment is a cumbersome and difficult piece of machinery, to be operated only in case of grave abuse of authority by judicial or executive officers.

Removal of judges

A number of states also have constitutional provisions authorizing the removal of judges for cause by the legislature or by the governor upon address of the legislature. Usually a concurrence of two thirds of the

Removal on address

[1] In Nebraska trial is not by the Senate but by a court.

CHAP. XIII

members elected to each house is necessary. It is relatively immaterial whether the constitutions provide for the removal of a judge by the legislature or for removal by the governor upon the address of the legislature. In Massachusetts and Virginia extraordinary majorities of the two houses are not required for this purpose. Two thirds of the members of each house of the legislature must concur in all of the other states except Washington and Illinois. In these two states three fourths of the members elected to each house must concur. In a few of the states the causes for removal by legislative action are expressly specified, but in others this matter is apparently left to the judgment of the legislative bodies or of the governor. In Massachusetts a constitutional provision was adopted in 1918 empowering the governor, with the consent of the council, after notice and hearing, to retire judges because of advanced age or mental or physical disability.[1]

Retirement

Several states have express constitutional provisions for the retirement of judges on account of age. In Connecticut and New Hampshire a judge is ineligible to serve after he reaches the age of seventy. In New York a judge must retire on the last day of December after reaching the age of seventy; and in Maryland a judge must retire at seventy unless the legislature sees fit to continue him for the rest of his term. The Louisiana constitution provides for the retirement of judges on two thirds pay after a certain number of years of service, upon reaching the age of seventy. Illinois in 1919 passed a law permitting judges who have reached the age of sixty-five and who have served twenty-four years in any one or more of the state courts to receive upon retirement an annual pension equal to one half of the annual compensation received during their last term of service. The movement for the pensioning of judges

[1] For a full review of the methods of removing judges see Massachusetts *Constitutional Convention Bulletin* No. 36, "The Removal of Judges in Massachusetts."

upon retirement has not as yet, however, extended to many states.

Recall of judges

The movement for the recall of public officers has led to constitutional amendments in eleven states. In seven [1] the provision for recall has been made applicable to judges, and four [2] expressly make the recall inapplicable to judges. The machinery for a recall is that of a popular petition, with the proportion of petitioners varying in the different states from 10 to 25 per cent., followed by a popular vote upon the issue of recall. The recall of public officers has in no state been employed as a means of seeking to control judges in the exercise of their broader functions, although it has several times been used in the case of judges accused of corruption or improper conduct.

Compensation

The compensation of judges has not usually been such as to attract able lawyers from lucrative private practice, although many lawyers receiving large incomes in practice have made pecuniary sacrifices for the purpose of assuming judicial duties. Some of the state constitutions expressly determine the salaries of judicial officers. Most of the states, however, now provide by their constitutions that judicial salaries shall be fixed by legislative action, with the condition ordinarily attached that the salary shall not be reduced or increased during the term for which a judge shall have been elected. The constitutions of thirty states authorize legislatures to fix judicial salaries without restriction except as to change during judicial term, while six have fixed a minimum salary but not a maximum salary, leaving increases to legislative action. Nebraska amended her constitution in 1920 so as to give the legislature authority in this respect. The Florida constitution expressly fixes judicial salaries.

[1] Oregon, California, Arizona, Colorado, Nevada, Kansas, and North Dakota.

[2] Idaho, Washington, Michigan, Louisiana.

CHAP. XIII

Clerks of courts

In connection with a discussion of the organization of courts, attention should be called to the fact that in most of the states the clerks of the several courts created by state constitutions or state law are popularly elected and are to a large extent independent of the courts themselves. This is not so true of the New England states as elsewhere. The movement for popular election of public officers has led to the popular election of clerks and of some other officers whose functions should properly be exercised under the control of the courts. Even when a new court is constituted and the legislature has discretion as to this matter, it not uncommonly makes the officers of the court elective by popular vote, just as are the judges. For example, the Illinois legislation of 1905, creating the municipal court of Chicago, provides for the popular election of the clerk and bailiff of that court. There has been a recent tendency to provide for the appointment of clerks by the courts themselves.

County as unit of judicial organization

The county is the chief unit of judicial organization, although in many cases trial courts of general jurisdiction exercise authority in more than one county; and in some cases official prosecuting officers are elected from the territory of more than one county. However, for the courts of general trial jurisdiction, terms of court are held in each county, jurors are drawn from the limits of the county, and prosecuting officers are in most cases elected one from each county. Clerks are provided and records are kept for each county separately, although the circuit or district court may exercise jurisdiction in several counties. Clerks of courts of general trial jurisdiction are usually elected from counties as a unit, and sheriffs who enforce the orders and serve the processes of the courts are elected from counties.[1]

Rural influence

The judicial organization of the states still has as its basis the rural conditions of seventy-five years ago. In

[1] In Rhode Island the sheriff of each county is elected by the legislature.

the early development of judicial organization, democratic tendencies were predominant and led to the provision of untechnical local courts administered by justices of the peace, with more general courts of trial jurisdiction sitting within each county. The judges and officers of these courts became popularly elective. In a number of states juries became not merely bodies to decide upon the facts presented to them, but also judges of the law in criminal cases. The judge who in earlier legal development had been the dominant factor in the administration of justice became substantially an umpire between the parties to the suit, with little of actual power to control the trials taking place before him.

Detailed procedure

Legislative acts now fix in great detail every step in judicial procedure, and the judge of the trial court must act with extreme care if he is not to infringe upon some one of these numerous details. Placing the judges of trial courts in a position of little power, and subjecting them to numerous details of procedure, the violation of which will result in the ordering of a new trial, has had the result of emphasizing the appellate jurisdiction of higher courts. These higher courts have a large negative authority to cripple the work of trial courts, but no great authority to improve conditions. To a large extent they exist as bodies for the enforcement of all of the numerous details of procedure that have been developed to control the trial of cases. Appellate courts review the action of the lower courts, without witnesses before them, and if they discover errors they send cases back for retrial. Little has yet been done toward giving higher courts an authority to pass upon all of the issues of the case, and to render a new judgment which, in their opinion, will accomplish justice, if they find that an error committed by the lower court can be corrected without retrial.

Summary

The movement for popular control has led to elective judges, prosecutors, and court clerks, and has vested in

locally chosen juries enlarged authority in the actual trial of cases. Detailed legislation as to judicial procedure has added to the difficulties, and the higher courts have been granted large authority to reverse the action of local courts, but little power to remedy the defects of judicial organization or to correct errors in trial courts without the cumbersome process of complete retrial.

NOTE TO CHAPTER XIII

In connection with the matters discussed in this chapter the most recent general discussion will be found in *Illinois Constitutional Convention Bulletin* No. 10, on "The Judicial Department, Jury, Grand Jury, and Claims against the State." For a valuable discussion now somewhat out of date see Simeon E. Baldwin, *The American Judiciary* (New York, 1905). The Journal and Bulletins of the American Judicature Society are indispensable for current information.

Students of government in each state should outline in some detail the judicial organization of that state and study tendencies toward the unification of the judicial organization. The two most important problems now involved are those relating to the choice of judges and to the inferior jurisdiction of justices of the peace.

CHAPTER XIV

THE ADJUSTMENT OF JUDICIAL ORGANIZATION TO PRESENT JUDICIAL TASKS

Need for judicial re-adjustment

THE courts of the states were created as bodies for the administration of justice in few and simple cases. Their organization has been rendered highly inflexible because to a large extent incorporated into constitutions and difficult to change. The task of administering justice is a function of the state rather than of its local communities. State judicial organization is theoretically a single organization, though operated chiefly by locally elected judges, with the aid of locally elected prosecutors subject to little central supervision and acting with locally chosen jurors. As need has arisen for a greater mass of judicial work and for more specialized judicial tasks, the effort to meet this need has been made by increasing the number of judges and by the multiplication of independent courts. These efforts have often resulted in the creation of a condition under which one court and one judge is idle or has little to do, and another court or another judge is overworked. There has been an over-emphasis upon appeals. The increasing mass of cases appealed to higher courts has been in a manner handled by multiplying the number of judges of highest state courts, by authorizing courts to sit in sections, and by the creation of inferior appellate courts. In most of the state courts which have more than one judge there is no permanent head to the court; and where there is a nominal head, there has been a tendency toward the so-called democratic policy of rotating judges of the highest court in the office of chief justice. There has, therefore, been no

CHAP. XIV

real opportunity to operate, as a unit for a single task, the state judicial system which is theoretically planned for the performance of one function.

Justices of the peace

One of the chief difficulties with the administration of justice in the states is that which centers around the justices of the peace. When the conditions of the country were distinctly rural, when people lived at great distance from each other and the means of transportation were slow and difficult, there was necessity for an untechnical court which should settle controversies promptly and according to common-sense rules. There is still need for such an organization, for to-day the greatest difficulties in the administration of justice are those of technicality and delay. But, with changed conditions and with rapid means of communication, the justice of the peace has proved unsatisfactory. In substantially all of the states justices of the peace are elected in large numbers and must rely upon fees for their compensation. The fee system of compensating officers has almost disappeared; but here it holds substantially undisputed sway, and has resulted in intolerable abuses.[1] A justice of the peace who is honest, and who merely exercises his office for the convenience of his neighbors, may still have an important place in the judicial system; but justices of the peace are numerous, and many of them desire to make a profit from their office. With each justice of the peace exercising jurisdiction over a whole county, the system of that county is as bad as its worst justice. In order to make a profit a justice of the peace must obtain business. In order to obtain business he must decide in favor of those who bring him business. For this reason, justices of the peace have come to be regarded as always likely to render their judgment in favor of the plaintiff in civil cases. In criminal cases, justices must get busi-

[1] The fee system still exists for the compensation of masters in chancery, and is unsatisfactory.

ness, and must find the accused guilty in order to obtain compensation from such business. This situation has almost necessarily led in many cases to collusion between justices on the one hand and constables or other local police officers on the other. The widely extended use of the automobile has brought the defects of the justice system to the attention of an increasing number of people, and has shown its ineffectiveness as a means of just and efficient administration of traffic laws and regulations. The justice system became so intolerable in larger communities that it has been replaced by municipal courts in many cities; and justices of the peace have been placed upon a salary basis in the larger communities of Washington and California.

Justice in small cases

The present system of locally elected justices without legal training, who are to be compensated by fees, must give way to some plan by which untechnical but common-sense and adequate justice may be administrated in small cases. The just decision of petty cases is the most important task of judicial organization, and a decision of these cases can not be left to an untrained judge, who must necessarily decide them according to the fees which he anticipates, and from whose decision an entirely new trial may be had in a higher court. It is not enough to say that if a justice of the peace acts unfairly a new trial may be had in a higher court; for new trials are expensive and cause delay, and the denial of justice in this country to-day is due primarily to delay and expense. The poor litigant can not afford the expense of a new trial in a higher court in order to escape the injustice of a lower tribunal. The whole tendency has been to neglect, not only the justice of the peace as the lowest tribunal, but the general court of trial jurisdiction, and to place emphasis upon appeals to the supreme court or to an intermediate appellate court. Justice delayed is justice denied; for witnesses die or move away, and a case that had merit if brought

CHAP. XIV

to immediate trial, fails many times because of delays due to the congestion of the courts, or a new trial on appeal from the justice of the peace, or from the further fact that cases in general trial courts are frequently reversed and returned for retrial.

Importance of small cases

In its organization and administration the judicial system emphasizes property interests and gages the importance of the case by the amount of the interest involved. This is in two respects an erroneous view. In the first place, much the greater part of modern legislation deals with social and industrial relations; and probably half the cases coming before the courts in large communities deal with such relations, without necessarily involving property rights. In the second place, more people are affected by small cases, and the expensiveness of appeal makes the action of the trial court final in most such cases. Moreover, the task of the judge in small cases is often more difficult because the litigants are unable to employ experienced counsel.

Criminal justice

The administration of criminal justice is unsatisfactory in most of the large communities of the country. Several factors contribute to this situation. Arrests are made by sheriffs and police officers, who are theoretically officers of the state, but who are under little or no supervision. The accused person is brought for preliminary hearing before a committing magistrate, who as a rule has no legal qualifications. If he is committed, an indictment by grand jury is still necessary in most cases before the accused can be brought to trial. The official prosecuting officer is the person who really determines whether there shall be an indictment, and whether there shall be a prosecution after indictments are found. Prosecuting officers are under little supervision, and actually determine whether criminal cases shall be tried and how promptly they shall be tried. A locally chosen jury determines the question of guilt. Finally, if there is trial and conviction, the

pardoning power rests in the governor. Not only this, but after a convicted person has served a portion of his sentence, a parole board may determine that he shall be released under certain conditions. Sentences for serious offenses are served in institutions controlled and administered by the state.

Lack of headship

No single head, and no single organization, is responsible for results in the administration of either civil or criminal justice. No adequate statistics are kept and no one knows how the whole machine of justice works. A witness to a crime, under present conditions, is punished almost as severely as the convicted criminal. He is likely to be summoned in turn before the committing magistrate, the grand jury, and the court, and subjected to infinite delays and postponements. The average citizen of good ideals can not be altogether blamed for failing to report criminal acts. Not only this, but jury duty is at best unpleasant in both civil and criminal cases, and most so-called good citizens find means of avoiding such duty. Crime has become an organized business; but the methods of dealing with crime are unorganized and headless. Some of the difficulties in the administration of justice are occasioned by the separation of government into three departments; but material improvements may be made without constitutional change. Difficulties caused by the lack of coördination in the administration of criminal justice have in some communities become so serious that unofficial organizations have been constituted to deal with the situation. The unofficially organized Chicago crime commission probably exercises more power than any one of the officially constituted agencies in that city for the administration of justice.

Specialization of courts

Unified courts with specialized branches have been set up in a number of larger cities. The municipal court of Chicago, established in 1905, is perhaps the best example of this plan. Through such an organiza-

CHAP. XIV

tion, specialized branches have been created in the larger cities for small claims, domestic relations, and certain other types of work. Some large courts have so apportioned cases that criminal cases are handled by one group of judges, equity cases by another, common-law cases by another, and divorce cases by still another. Where probate and juvenile courts have been created, there is still further specialization of the judicial task. Some specialization as between common-law and equity cases of course exists. In the specialization of judicial business there has been some tendency to set up a separate court for each special task. Unity in the administration of justice is destroyed by such a plan. Moreover, while judicial work needs to be organized into specialized branches, there is much to be said against having the same judge constantly deal with the same type of cases, and periodical reassignment may be made if a number of judges serve in a unified court. There is much to be gained by having a judge come freshly to his task, and a specialization of judicial organization does not necessarily mean a permanent specialization of the judges who go to make up that organization.

Overlapping jurisdictions and congested dockets

In the larger urban communities we often find courts with overlapping jurisdictions, so that litigants may choose between courts. This overlapping authority exists also to some extent in smaller communities. In some larger cities court dockets are so congested that a year or two may be required to obtain a trial after the parties are ready. In civil cases, counsel for litigants to a large extent determine whether trial shall take place as soon as possible. Postponements are frequently granted, and continuances often destroy valid claims. Dockets of appellate courts are also in many cases congested, and delays occur in the final disposition of cases on appeal. A better organization to avoid delay and administer justice may be obtained by establishing a unified court in each state, with extensive authority over

its own procedure, from the beginning of the pettiest case to the final decision of the highest court.

Single trial court

In some states an element of unity in the system of trial courts has been developed by what may be termed the single trial court system. In Arizona and California there is one court in each county exercising complete original jurisdiction above justices of the peace. In the smaller counties a single judge presides over this court. In the more populous counties additional judges are required. A single general trial court system with the county as a unit is also employed in Ohio, and the chief justice of the supreme court of Ohio is expressly given authority to assign judges from one county to another. In actual practice judges are to a great extent assigned from smaller to larger counties. The same result of a single trial court of general jurisdiction is largely accomplished in Indiana and Iowa. Indiana has a circuit court which usually embraces a single county, although in a few instances two small counties have been combined to form a circuit. The circuit court has general trial jurisdiction, and in most counties is the only court of record, although in the larger communities additional trial courts have been established with extensive original jurisdiction. Iowa has what is known as the district court system. The district comprises one or more counties. From two to five judges are elected for each district, according to its size. This court has complete jurisdiction over all matters; and, except in a few cities having superior courts or municipal courts, or both, it is the only court of record. In some states, therefore, a distinct effort has already been made to avoid the confusing situation of having a group of trial courts with overlapping jurisdictions.

Unified trial courts

The superior court of Massachusetts is a single court of general jurisdiction for the whole state. It is composed of one chief justice and twenty-seven associate justices. The law provides that "the chief justice shall

CHAP. XIV

make such assignments for the attendance of a justice at the several times and places appointed for holding the court as will be most convenient and as will insure the prompt performance of its duties." The municipal court of Chicago is another illustration of unified administration within a single court. Overlapping jurisdictions, however, exist both in Massachusetts and in Chicago.

Tendencies toward unified judicial system

There have been some tendencies toward a unified judicial organization, and several states have vested the supreme court with supervisory control over the inferior courts of the state. The constitution of Michigan provides that "the Supreme Court shall have a general superintending control over all inferior courts," and similar provisions are to be found in the constitutions of several other states.[1] In Missouri, in addition to the general superintending control over all inferior courts given to the supreme court, it is provided that "the circuit court shall exercise a superintending control over criminal courts, probate courts, county courts, municipal corporation courts, justices of the peace, and all inferior tribunals in each county in their respective circuits"; and that the St. Louis court of appeals "shall have a superintending control over all inferior courts of record" in the counties in which it has jurisdiction. However, such broad general powers as this are of little use unless coupled with some subordination of other courts to the supreme court, and with some organization of machinery by which the supreme court may exercise its superintending control. In some states the supreme court is expressly granted authority to issue writs of prohibition;[2] and in this manner to control the actual proceedings of lower courts; but this, while a means of preventing serious abuses in important cases, is not a means of control

[1] Arkansas, Colorado, Iowa, Louisiana, Missouri, Montana, New Mexico, North Dakota, Oklahoma, South Dakota, Wisconsin, and Wyoming.

[2] Arizona, Arkansas, California, Delaware, Idaho, Louisiana, Nevada, Ohio, South Carolina, Utah, Washington, West Virginia, and Wyoming.

that can be employed so as to build up an effectively working judicial organization.

Supreme court with power

There is an increasing tendency to adopt the plan, embodied in the Ohio constitution, of having the chief justice of the supreme court exercise some degree of executive authority over the judicial system of the state through a power to assign judges from one county to another. Such a plan exists in Nebraska. In Louisiana the constitution not only grants the supreme court power to issue writs of prohibition, but also seeks to give to that court an effective power of supervision over the judicial system:

"The Supreme Court shall also have the power, under such general rules and regulations as it may adopt, as well as by special orders made in particular cases, to assign for any cause judges of one District Court to another District Court, and to provide for the interchange of judges of the District Courts, in such manner as best to carry out the purposes for which courts are created, and to secure the prompt and efficient administration of justice; and may also assign district judges to the Court of Appeal whenever the judges of said Courts of Appeal are called to sit with the Supreme Court. It shall also have power and authority to require all inferior courts to make such reports of the nature, character, amount, and condition of the work and business before them as the court by rule may prescribe, and to direct such investigation into the business and affairs of such courts as it may deem proper, and to that end to require the services of the Attorney-General, his assistants, or such other officers as may be found necessary."

Improvement by statute

It is not necessary to rely upon constitutional change for all steps in the improvement of the judicial system. Legislative power over judicial organization is large in some states, and some power exists in all. The judicature commission of Massachusetts has recommended the establishment of a judicial council, to study continuously and as a whole the judicial organization

CHAP. XIV

of that state. This commission rightly says: "Some central official body is needed for the continuous study of questions relating to the courts." In Wisconsin the circuit judges are organized by law into a "Board of Circuit Judges," with power to require reports, and to assign judges from one circuit to another. In this way many of the advantages of a single trial court for the state are obtained.[1]

Organization of appeals

In many states the courts are so organized that a party after a trial in a court of general jurisdiction may appeal first to one court, and then from it to another court; and, if an error is found in the action of the trial court, may obtain a new trial, with the possibility of another series of appeals. If the work of doing justice were organized as a single unit, it should be possible to do justice more effectively in the trial court. But, in any case, it will be necessary to permit one appeal as a safeguard in cases where the lower court may have committed errors. Ohio, by constitutional amendment in 1912, reorganized her judicial system so as to create more definitely an intermediate series of appellate courts; but at the same time she sought to restrict a party to a single appeal in one case. However, although there is a present tendency, where there is an intermediate court of appeal, to limit the party to a single appeal, this limitation is to a large extent accomplished by arbitrary and mechanical means; and the system of appeals is not definitely planned with reference to a unified judicial system for the doing of complete justice.

Powers of a unified court

If an effective judicial organization is to be established in the American states, not only must there be a single and unified judicial organization for the per-

[1] See *Journal of the American Judicature Society*, V, 105 (December, 1921). This society has been the most effective organization in promoting the movement for a unified court; and upon this subject probably the most important publication is its *Bulletin* No. 7-A entitled "Second Draft of a State-Wide Judicature Act" (Chicago, 1917). Upon the subject of a unified court see *Illinois Constitutional Convention Bulletin* No. 10, pp. 793-803.

formance of the work of administering justice from the smallest case to the most important, but there must also be an actual power in this unified organization to solve its own problems. Courts which are composed of several judges are often presided over by the members of the court in rotation, without any provision for the development of a continuous administrative policy in connection with the judicial function. Clerks of the courts, who do a large part of the administrative work necessary for efficient enforcement of the law, are in many cases independent of the courts themselves. No court can properly put in order the administrative side of its task, if those who are to do the administrative tasks are substantially beyond its authority.

Masters

Courts of equity to a large extent use masters in chancery as agencies of the judge for the hearing of cases and for the preparation of reports. It is not common to use masters or similar aids in the administration of common-law cases and in probate and other cases involving a large amount of detail, though in some large communities judicial assistants have been provided. In many cases judges are required to administer justice without being given the machinery necessary for the doing of justice.

Rules of court

If a unified state court is to be organized for the doing of the single task of administering justice from the smallest to the highest case, the court not only must have the power to control its administrative officers, but must have authority to regulate its procedure, in order to do away with many of the technicalities and complexities that now occasion delay and expense. Reference has already been made to the fact that legislatures seek to regulate in great detail the procedure of courts. Public policies and rules of private rights should be determined by the legislature; and the procedure for the adjudication of cases should be determined by the judicial department. It is proper and desirable that the

CHAP. XIV

legislative body, as the policy-determining body of the state, should keep control over the policy of judicial procedure. For judicial procedure and the protection of the substance of individual rights are closely related; and if the courts were to have complete authority, independently of legislative action, to control all matters of judicial procedure, they could determine the state's policy as to the rights to be litigated under that procedure. The courts have always exercised some authority with respect to the details of their organization and procedure, but virtually always under legislative acts prescribing somewhat minutely how they shall be conducted. In a few cases specific courts have had broad rule-making power conferred upon them, as for example the municipal court of Chicago.

Rule-making power must be responsibly exercised

The rule-making power needed to make the administration of justice efficient is, however, a power to be exercised by a single state judicial organization, for the purpose of developing efficient methods for all parts of the judicial organization. The constitution of Michigan provides that "the Supreme Court shall by general rules establish, modify, and amend the practice in such court, and in all other courts of record, and simplify the same." The New Jersey courts have exercised a broad rule-making power since 1912, under the terms of statute; and in Colorado large rule-making powers were given to the supreme court by statute in 1913.[1] There is no reason why the state legislative body should not divest itself of the detailed regulation of judicial procedure by vesting in the courts a broad power to regulate judicial administration, subject to the power of the legislature to determine the general policy under which such rules should be established. In England there is a well established rule-making power in the courts themselves. The vesting of such authority in a

[1] Broad power to regulate judicial procedure is also found in Alabama, Vermont, and Virginia.

unified state judicial organization in no way limits the authority of the legislature. It frees the legislative body from a task that it can never competently perform, and vests that task in the body that has the greatest interest in its efficient performance.

A state department of justice

If we are to have an efficient administration of justice, there must be not only a unified judicial organization whose various parts work harmoniously together, and control by this body over its administrative officers and over the rules under which it is to perform its duties, but also a state department of justice whose function it is to coöperate from the executive side in the full and complete performance of judicial functions. In the administration of criminal justice we have to-day an attorney-general and also locally elected prosecuting attorneys; but in no state is there a complete and effective control by the state government over the locally elected prosecuting officers. Louisiana, by its constitution of 1921, has recognized the attorney-general as a superior officer over local prosecuting attorneys; and by giving him authority over them, that state has taken a definite step toward the establishment of a state department of justice. Not only must the state department of justice control the prosecution of violations of state law and the defense of accused persons who are unable to employ counsel,[1] but it must devote its attention to a careful study of the whole administration of justice so as to aid in the correction of defects that may arise in the administration of civil and criminal justice. In civil matters also there are often proceedings, *e.g.*, divorce proceedings, in which the two parties are really not opposing each other, but both desire the same result. In such cases a representative of the public should be present.

[1] For a striking illustration of state aid to parties in private litigation, see Smith, *Justice and the Poor*, p. 96. Mr. Smith there discusses rather fully the authority vested in the Massachusetts labor commissioner to aid employees in collecting wages, by making the complaint in court where the state law with respect to the payment of wages has been violated.

CHAP. XIV

A state department of justice should be charged with the duty of exercising general supervision over the administration of both criminal and civil justice, from the point of view of the executive department, and with the collection and publication of judicial statistics in such a form that defects in the administration of justice in any part of the state or in any type of case may at once be detected.

Quasi-judicial bodies

The judicial tasks of the present day differ essentially from those of fifty years ago. State laws in almost all of the states have set up public utility commissions, workmen's compensation commissions, and other administrative bodies with quasi-judicial powers. The actions of such bodies are subject to judicial review. Virtually a new body of law has been developed within recent years with respect to the method and extent of judicial review over the determinations of these quasi-judicial bodies. In the field of workmen's compensation, a distinct improvement has been made by transferring to an administrative body the determination as to whether an employee should receive compensation and as to its amount, leaving to either party an appeal to the court if he is dissatisfied with the decision of the administrative body. An administrative body can act less technically and oftentimes more promptly in these matters, and still leave to any one who is aggrieved an adequate judicial protection of his rights. Such a body vested with quasi-judicial powers tends, it is true, to become technical and to build up a procedure that results in delays; but many issues of pecuniary claims now passed upon in the first instance by the courts may perhaps be properly transferred to administrative bodies, and more satisfactory results obtained, provided an effective judicial review is preserved. Some judicial review will be preserved, because constitutionally required. The whole problem of the relationship between administrative and judicial functions

has undergone substantial change, and will probably undergo even greater change in the next fifty years. Courts have not as yet organized, and may not be able to organize, the most effective machinery for the preliminary determination of complex issues such as valuations of public utilities and other matters upon which public-utility rates may depend. The functions vested in administrative bodies, not only with respect to public utilities and workmen's compensation, but also with respect to many claims arising under public health and other laws, may perhaps be best performed by administrative bodies, and their performance by such bodies in no way interferes with or decreases legitimate judicial functions. It is immaterial whether these bodies be termed executive, or whether they finally become parts of the judicial organization itself. It is important that proper methods be established for the judicial review of decisions of such bodies. Administrative tribunals may perhaps be most effectively used as subordinate agencies in the judicial organization if the courts come to be organized in such a way as to do their work effectively. Through its creation of a Court of Industrial Relations in 1920, Kansas is trying the interesting experiment of settling labor controversies through an administrative tribunal.[1] This tribunal is given broad power to determine conditions of employment, and also exercises the authority of a public utilities commission.

Avoidance of litigation

Not every possible controversy can be settled in court; and a great number of the controversies that come to the courts for settlement could have been avoided by a reasonable degree of care. A report prepared jointly by the New York State Bar Association and the Chamber of Commerce of the State of New York in 1917 says: "On the basis of space devoted to each subject in the standard digest of all reported cases in the State of New York, the volume of litigation concerning wills

[1] Kansas Laws, special session, 1920, p. 35.

CHAP. XIV

seems to exceed by far that of any other subject before the courts. It also appears that of this great volume of litigation 82 per cent. is of a preventable nature, while 73 per cent. concerns the meaning of the instrument, and less than 8 per cent. concerns mental capacity, fraud, and undue influence." The task of the courts is to deal with cases after they present themselves and not to prevent the occurrence of disputes. However, in a number of cities municipal courts have established conciliation branches for the amicable settlement of issues that may otherwise go to trial.

Arbitration

The courts have always favored the settlement of cases by arbitration, or by compromise after the trial has begun. Recently in this country there has been a distinct trend toward the use of arbitration for the settlement of disputes without going to the courts. In England, commercial arbitration has succeeded in settling out of court a great mass of commercial disputes, and has thus avoided not only the expense of litigation, but also the added burden of work upon the courts themselves.[1] Many commercial contracts in England and in this country expressly provide for the settlement by arbitration of disputes arising out of the contract. A legal doctrine, however, became accepted in this country that such an agreement to arbitrate may be revoked by either party thereto at any time before an award is made. This legal doctrine has now been abandoned in England, and has been overcome by legislation in Illinois in 1917 and in New York in 1920. The movement for the arbitration of disputes without the need of judicial action may be expected not only to relieve the courts from an undue burden of work, but also to produce better feeling in the settlement of commercial disputes. Of course it is wisest to take such precaution in the transaction as to avoid disputes altogether,

[1] See *Bulletin* No. 12, *American Judicature Society*, "A Report on Commercial Arbitration in England," by Samuel Rosenbaum (Chicago 1916).

rather than to resort to their settlement after they have arisen, either by judicial action or by arbitration. The prevention of disputes is more important than their settlement. On the whole, however, the prevention of disputes is not a matter for the courts, but it is an important matter for the consideration of those who practise the profession of the law.[1]

Declaratory judgments

In one important way, however, the courts may be important positive factors in the avoidance of litigation. There has been an established power in the English courts for a number of years, by which parties having rights involving a legal issue may apply to the courts and obtain a declaratory judgment settling the legal issue and fixing the rights of the parties before a controversy actually arises. This English legislation was copied in 1919 by Michigan, Wisconsin, and Florida; in 1920 by New York; and in 1921 by Kansas and Hawaii. Unfortunately, however, the supreme court of Michigan [2] declared the law of that state unconstitutional, as involving a function not properly judicial. Certainly neither the executive nor the legislative department has authority to determine a legal issue between parties, in advance of a controversy involving the issue; and if the function is not judicial, it can not be exercised by any department of government. For example, the terms of a will are uncertain; but property under the will is so vested that the parties beneficially interested have no present legal controversy, though a future controversy is necessarily involved unless the construction of the will is settled. There seems no constitutional objection to a court's settling this issue now upon the application of the parties, rather than waiting until a controversy arises. The supreme court of Kansas has properly taken the view that the function of administering jus-

[1] Upon this matter see W. F. Dodd, "Preventive Justice," *Journal of the American Bar Association,* VI, 151-153 (1920).

[2] Anway *v.* Grand Rapids Ry., 179 N. W. 350 (1920).

CHAP. XIV

tice involves the settlement of legal issues in advance of litigation, as well as their settlement after a controversy has arisen.[1]

Defects in administration of justice

The present difficulties in the administration of justice in civil cases have been summed up by a recent author as primarily the following: (1) delay; (2) technicalities; (3) court costs and fees; (4) cost of counsel. These are the four elements that occasion the greatest difficulty to a poor litigant, and that give to the rich and powerful litigant the opportunity of substantially defeating justice where his opponent is weak. The elements of delay and technicality can not be dealt with effectively without an efficient organization of the courts for the administration of justice. Such an efficient organization should reduce the expense for fees and costs and much of the present expense for counsel in litigation.

Justice equally the right of all

The courts are social agencies for the performance of a distinct function of government, and must administer justice promptly and efficiently. The problem is more complex in large urban communities, but the purpose of judicial administration is the same everywhere. The Hon. Elihu Root recently said: "No one doubts that it is the proper function of government to secure justice. In a broad sense, that is the chief thing for which government is organized. Nor can any one question that the highest obligation of government is to secure justice for those who, because they are poor and weak and friendless, find it hard to maintain their own rights. . . . But the rapid growth of great cities, the enormous number of immigrants (many of them ignorant of our language), and the greatly increased complications of life have created conditions under which the provisions for obtaining justice which were formerly sufficient are sufficient no longer. I think the true criticism

[1] Edson R. Sunderland, "The Courts as Authorized Legal Advisors of the People," *American Law Review*, LIV, 161-192 (1920). E. M. Borchard, "The Declaratory Judgment—a Needed Procedural Reform," *Yale Law Journal*, XXVIII, 1-32, 105-150 (1918).

which we should make upon our own conduct is that we have been so busy about our individual affairs that we have been slow to appreciate the changes of conditions which to so great an extent have put justice beyond the reach of the poor. But we can not confine ourselves to that criticism much longer; it is time to set our own house in order."[1] Legal aid societies have done much in the American cities to aid the poor in obtaining justice. But justice should be within the reach of all without the aid of private organizations. To-day justice is not within the reach of many; and these many include not merely those who are so poor that they must seek outside aid, but also a great number who are outweighed by their opponents in cases where they have legitimate grounds for relief. Delays and technicalities give the advantage to the longer purse. If government is to continue to perform its functions efficiently, justice must again become the same for the poor and for the rich.

[1] See Reginald Heber Smith, *Justice and the Poor*, for a full discussion of the present limitations upon the effectiveness of the courts in the administration of justice.

NOTE TO CHAPTER XIV

Reginald Heber Smith's *Justice and the Poor* and *Criminal Justice in Cleveland* (Cleveland, 1922) are perhaps the two most important single volumes dealing with the problems of present judicial organization. The survey of criminal justice in Cleveland was undertaken by the Cleveland Foundation, and is the first detailed investigation of criminal administration in a large city. *The Journal of the American Judicature Society* (31 West Lake Street, Chicago) is indispensable as a means of following judicial development from month to month.

The subject of declaratory judgments is one deserving special consideration from a student of state government. The same statement applies to the subject of arbitration of commercial disputes.

In this chapter there is a brief discussion of the development of administrative tribunals. It would be well for students of state governments in each state to investigate the administrative tribunals of that state, and to determine the relationship of such tribunals to the courts. Little has yet been done in the careful investigation of the work of a single commission in passing upon issues of workmen's compensation, although several valuable reports upon this subject have been published by the United States Department of Labor.

CHAPTER XV

LOCAL GOVERNMENT AND THE STATE

Theory of organization

GOVERNMENT through local areas, with locally elected officials, is a fundamental part of the organization of the American state; though a number of county officers are appointive in New England, and the Rhode Island county has no elective officers. In the earlier history of the United States, local areas were regarded as agencies of the state government to a greater extent than now; and important city and county officers were chosen by the state itself rather than by the voters of the local communities.[1]

Twofold function of local government

Areas of local government have in virtually all cases functions of a twofold character. They are agents of the state in the performance of its tasks; and they are agents of their local communities for the performance of tasks in which such communities are primarily interested. These two types of functions can not be sharply separated from each other. Matters chiefly of local interest in one generation become of state interest in another. A function of government may be primarily of local interest when conducted on a small scale, but of general state interest when it increases in magnitude. All of the functions of government within its boundaries are of direct interest to the state government, although the extent of that interest varies. Not only this, but in most of the states local areas receive their revenues in large part from the same sources as does the state—state and local taxation to a large extent constituting one system. The state is also interested in the methods by which local areas conduct their business. Govern-

[1] James, *Local Government*, pp. 90, 97.

ment is a single task, conducted by different agencies, it is true; and the efficiency of government within a state depends not merely upon the central organization at the state capital, but also upon the effectiveness of the local governing areas within the state, and upon their coördination with the central state organization.

Urban and rural problems

The territory covered by the forty-eight states is partly urban and partly rural. The problems of governing local areas range (*a*) from those affecting great cities, through (*b*) those affecting smaller cities and villages, to (*c*) those bearing upon distinctly agricultural communities. These several types of governmental problems are not sharply separated from each other, but all exist side by side in virtually every one of the states. All of the forty-eight states are divided into counties, if we include Louisiana, where local areas of this character are termed "parishes." The difference in type of governmental problems presented by the counties in the forty-eight states is indicated by the following quotation:

"First there is the class of rural counties, that is, counties which contain no cities of any magnitude, even the county-seat, which is generally the largest urban community in the county, scarcely attaining a population of 5,000. This class includes by far the greatest number of counties and may be regarded as the typical case, though with the continuing concentration of population in urban centers and the general increase in population, the number of counties in this class will necessarily decline. In the next class may be grouped those counties in which there are one or more cities of considerable size, let us say of 25,000 inhabitants or more, the county-seat being usually among such cities. According to the 1910 census, there were 229 such cases. Most of these cities are the only cities of 25,000 or more inhabitants within their counties, though in Connecticut, Massachusetts, New Jersey, New York, and Rhode Island there were counties containing as many as three cities of this population. Even where there was only one such city in the county, the general rule in this

CHAP. XV

class of counties, this city usually comprised more than one half of the population of the county, but only a small part of the area. Of the fifteen largest cities in the United States in 1910, New York City comprised five counties within the corporate limits, Philadelphia, St. Louis, Baltimore, San Francisco, and New Orleans had identical boundaries for city and county, and the nine others contained a percentage of the population of the county in which they were located varying from 52 per cent. in Pittsburgh to 90 per cent. in Chicago.

"A third class of counties, less numerous than the first but more numerous than the second, comprises those in which there are several cities smaller than twenty-five thousand in population but nevertheless presenting urban conditions and interests distinct from those of the strictly rural portions of the county. This situation, which presents some governmental problems of its own, is met with very generally in the more thickly populated states, and is likely to become more and more common with the increasing urban concentration. In New York, for instance, there were in 1910 127 incorporated places of between 2,500 and 25,000 inhabitants in the sixty-one counties; in Pennsylvania 243 such places in sixty-seven counties; and in New Jersey 74 in twenty-one, or on an average more than three such incorporated places in each county." [1]

Urban and rural problems closely united

In some states the governmental problem of the great city does not exist. In others the problems of local government are largely urban. It is, of course, a characteristic of urban population that it involves the concentration of large masses of people in small areas. Rural areas with more scattered population involve different problems from these congested districts; yet rural and urban populations lie side by side in the same local governing areas. For example, Cook County in Illinois, with an area of 933 square miles, has a population of more than 3,000,000 inhabitants. Of this population Chicago has 2,701,705; there are three other incorporated communities with more than 25,000 inhabit-

[1] James, *Local Government*, p. 123.

ants each; four others with less than 25,000, but more than 10,000; nine with populations ranging from 2,500 to 10,000; and in addition a large number of village governments. Yet much the greater part of the territory of this county involves problems that are distinctly rural in character. There is no single problem of local government in the forty-eight states, or in any one of them. The chief issues that present themselves are, however, those that bear upon the relationships between state and local functions on the one hand, and urban and rural government on the other.

Ordinary forms of local government

Certain types of organization are found which, because of their generality, may be termed the ordinary forms of local government. These are (*a*) the county, which is found in all of the states, though the name "parish" is employed for a similar unit of local government in Louisiana; (*b*) towns or townships, which in most of the states where they are found are merely subdivisions or units of the county, although the New England town was the original area for local government and is more important than the county; (*c*) the city. In addition to the city, which is theoretically the chief unit of local government for urban areas, most state laws provide for the incorporation of small communities as villages, with a simpler form of government than that provided or permitted for cities. As a matter of fact, however, many states permit the incorporation of small communities as cities, so that no sharp legal distinction is made between the governmental problems of small and large urban communities. For example, in Illinois the minimum population for incorporation as a city is 1,000; and the minimum population for a village is 300.

Other local areas

In addition to these ordinary types of local government, other forms will be found in each of the states. Park and sanitary districts in more settled areas, drainage and irrigation districts in rural communities, road

CHAP. XV

districts, school districts, and numerous others will be found oftentimes occupying the whole or a part of the same territory as that covered by the ordinary types. Their existence greatly complicates the effort of the student to obtain a simplified view of local areas of government.

Purpose of present discussion

No effort is made here to discuss in detail the problems of local government. This chapter seeks to outline the organization of local areas and their relation to each other, with special reference to the governmental problems of the state as a whole, and pays little attention to matters that are fully discussed in other chapters.[1] Although the subject of city government is of intrinsically great importance, this book does not seek to discuss it fully, and actually gives greater attention to other forms of local government that the reader may regard as less important. This has been purposely done,[2] for in the discussion of local government too great a proportion of emphasis has heretofore been laid upon cities. Too little attention has been given to other local areas that are usually found covering both rural and urban territory. In most of the states the government of counties, towns, and special districts constitutes, not a problem of rural districts alone, but of cities as well. The problem of the city is equally as much that of relationship with these areas as of governing the distinct municipal corporation termed the "city."

THE COUNTY

Number and size of counties

There are more than 3,000 counties in the United States. Delaware has 3, Texas 253; but the number

[1] Chapter III discusses the problems of home rule, and of state and local functions; Chapter XI, the relationship between the state and its local areas in the enforcement of state policy; and Chapter XVI the relationship between state and local finance.

[2] There is not sufficient space in a book of this character to deal adequately with the special problems of cities or other areas of local government. Moreover, the subject of city government is adequately dealt with in books devoted to that subject

of counties is proportionate neither to the area nor the population of the several states. In the six New England states the county is less important than in other parts of the union, and the number of counties is proportionately smaller than in other sections, varying from 5 in Rhode Island to 16 in Maine. A few of the more sparsely settled western states have a small number of counties; but the states average more than 60 counties each, with several running over 100. Counties vary materially in size and population. Leaving aside wide variations, the typical county in this country may be said to have an area of 600 square miles and a population of 20,000. Such general figures are, however, misleading, for counties in the North Atlantic states average over 100,000, while a typical western county is likely to have not more than one tenth that number.

Creation of new counties

In the North Atlantic states and some others the constitutions do not limit the power to create new counties. The constitutions of most states, however, now contain express restrictions upon this matter, prescribing a minimum area and in many cases a minimum population. About a third of the states require local referenda for the changing of county boundaries, and also for a change of county-seats. These restrictions have been set up as a result of bitter controversies over the division of counties and the removal of county-seats. In the newer states the creation of new counties and the readjustment of county boundaries are frequent; but such changes are infrequent in counties east of the Mississippi River, and the counties in these states may be regarded as permanent areas of local government, though new creations have not been infrequent in Georgia.

Counties of varied population

Throughout the greater part of the country counties have tended to become the chief local agents of the state government. The state's task of supervising the local performance of its functions by counties is made much more difficult by the existence of an undue number of

CHAP. XV

counties. Not only this, but counties of small population are unlikely to have financial resources sufficient to perform effectively their functions as counties; and the very smallness of the tasks of such counties leads to inefficiency. Yet in the older states the early division of territory into counties has to a large extent fixed the permanent basis of county government. For example, Illinois has 102 counties, 9 of which have less than 10,000 inhabitants each, and 56 of which decreased in population between 1910 and 1920. Constitutional provisions interpose difficulties in the way of changing county lines in this state, as in others; though these boundaries remain fixed not merely because of constitutional barriers. County lines are equally permanent in the older states without such constitutional provisions. In discussing county government, it must be borne in mind that this substantial permanence of county lines constitutes a serious problem in most states, and assures the continued existence of counties of varied population and area.

Character of county functions

In its earlier development in the United States the county was almost entirely a local agent for the performance of state functions; and to a large extent it retains this character. Originally the county was not an incorporated body, but now in a large number of the states it is a municipal corporation, although because of its more distinctly governmental functions, and of its position as an agency of the state, it has less of legal liability as a corporation than do cities and other local governing bodies performing functions of a more distinctly local character. The importance of the county and of its governmental functions varies a good deal from one part of the country to another; and even in the same section of the country there are great variations in its statutory powers and duties. In New England the county is largely restricted to functions connected with the administration of justice; the number of county officers is less than in other states; the appointment of

county officers more generally prevails; and, because of the limitation of the functions of the county to the administration of justice, state administrative control over the county is greater than elsewhere. The more limited functions of the county as an agent of local government in New England arise chiefly from the fact that in New England the town is the chief local governing body, and also to a large extent an agent of state government as well, and the chief local unit for representation in the legislature. However, even in New England the county is recognized as a unit of senatorial representation in Massachusetts, Vermont, and Rhode Island. Outside of New England the county is distinctly more important as a unit for the performance both of state and of local functions.

Enumeration of county functions

Although the functions of counties vary, it may be said that their chief governmental activities relate to taxation, the administration of justice, education, charities, roads, and the conduct of elections. In almost all of the states the county is a district of great importance in financial administration. In most of the states it has important functions in connection with the assessment of property, and acts as the agent for the collection of state revenues.

Justice

One of the chief functions of the county in all of the forty-eight states is that connected with the administration of justice. Courts of civil and criminal jurisdiction are held in each county. Presiding judges in these courts are often selected from a larger district than the county, but the administrative offices of the court are regularly county offices. Court-houses and jails are provided in each county. Through the office of sheriff, the county is also the chief unit of the state for the enforcement of law and the arrest of persons accused of crime.

Roads, charities, schools

Outside of the New England states, the county is in almost all cases an important unit in the construction and maintenance of roads and bridges. In most states

CHAP. XV

it is the district for the administration of poor relief. Generally it has some functions in connection with school administration; in many of the southern states it is, indeed, the primary unit for school administration, and it has tended in many respects to become the most important unit for this purpose in some of the northern states.

Elections

The county is an important district for election purposes. Most county officers are elective. The county is a unit for canvassing the returns for state officers; and in most states it is the district for electing members of one or both of the two houses of the state legislature. The importance of the county as an election area is further strengthened by the fact that the county is almost of necessity the important unit of the state for the organization of political parties.

Legislative functions

The legislative functions of the county are limited. In most of the states the power of the county to enact local ordinances is either non-existent or slight. With the development of local needs there has been a tendency to enlarge the powers of the county in this respect, and to give it therefore more authority as an independent governing agency. However, counties have almost never been granted any broad authority to enact local ordinances such as is usually conferred upon the governing authorities of cities and villages.

Relative importance of counties

The statements made above have been in part summarized and quoted from Professor John A. Fairlie's important work on *Local Government in Counties, Towns, and Villages.* A quotation from this book gives concisely a statement as to the relative importance of the county in different parts of the United States:

"Measured by the number of functions and the relative distribution of local administration between the county and minor districts, the county is of most importance in the Southern states and the Mountain and Pacific Coast states of the West. By the same tests, it

is of least importance in New England, where the county is weakened by the centralization of the judiciary on one hand, and the importance of town government on the other. In the Middle-Atlantic and North-Central states it occupies an intermediate position. But if a quantitative standard of the intensity of county administration is applied, the results are somewhat different. Judged by the *per capita* rate of expenditure, the county is of much the greatest importance in the Western group of states. Second rank is taken by the North-Central and Middle-Atlantic states, while by this standard the Southern states fall in the same group with three of the New England states, Massachusetts, New Hampshire, and Maine. In two of the remaining New England states, Connecticut and Vermont, county finances are almost negligible; while in Rhode Island the county expenses are entirely included in the state budget. While the *per capita* importance of county administration in the Southern states is less than in the Central states, the county is comparatively more important, for the total volume of local administration in the South is much less than in the Central states."[1]

County organization

There is no plan or principle in the organization of county government. Under the constitutions there is no necessity for applying the principle of separation of powers; and usually there is a county board which serves as the chief county authority, both legislative and executive. In Rhode Island there is no county board; and there are but two county officers, sheriff and clerk of court, both appointed by the legislature. In Georgia the powers generally exercised elsewhere by a board are in the hands of an elected officer termed the "ordinary." County boards in Connecticut are chosen by the two houses of the legislature, and the sheriff is the only locally elected officer. The county in Rhode Island and Connecticut can hardly be termed an area of local government. It is rather a subdivision of the state for convenience in state administration.

[1] Fairlie, pp. 67-68.

CHAP. XV

Lack of unity

Aside from the three states just mentioned, county government has certain common characteristics.[1] There is an elective board, of varying size and composition, with certain general powers, and there is a group of elective county officers, each independent of the other and of the county board. Under the elective system there has been set up in the county a government composed of independent units, all presumably performing parts of the same task of local government, but without a single head or a single responsibility. When a new function of county government has needed to be performed, a new office or board has been created, usually independent of all existing county officers. The situation in the county has been worse than in the state executive department; for in the state administration there has always been a single officer, the governor, who theoretically served as the head of the executive department, and who actually occupied a position of superior importance in the state administration.

County board

It is difficult to make any precise classification of elective county boards. They are usually grouped into two classes: (1) small boards of commissioners elected at large for the county; and (2) much larger boards elected by townships and cities within the county. However, these two groups by no means cover all of the types. In the four New England states that have locally elected county boards, these boards are composed of a small number of commissioners elected by the county at large. In some of the more important middle western states[2] there is a small county board composed of members elected at large; but in another group of states within this same area[3] small county boards are elected by districts into which the counties are divided. In most of the southern states the county board is a

[1] For the number of counties in each state, and an outline of county organization, see table in *The American Year Book* (1919), p. 221.

[2] Pennsylvania, Maryland, Ohio, and South Dakota.

[3] Indiana, Iowa, Minnesota, North Dakota, Nebraska, and Kansas.

small body of from three to five members, elected either at large or by districts into which the county is divided. In the mountain and Pacific states of the West, the county board is always a small body, elected either from the county at large or from districts into which the county is divided.

Township representation

In a small group of important states [1] county boards are composed of representatives from the townships and cities. A similar plan will be found in Tennessee and Arkansas, where justices of the peace constitute the fiscal and administrative authority of the county. In Kentucky, by recent legislation, the number of magisterial districts in each county has been reduced to eight, and in this manner the size of the county board has been reduced.

Size of county board

In the group of states that have a county board made up of township representatives, the county governing body is in many cases entirely too large for effective work. The board of supervisors, which is theoretically the head of the county government in Michigan, is composed of from 24 to 97 members, meeting from two to four times a year. The boards of supervisors in the 84 counties of Illinois having the township system range from 5 to 53 members, and in 30 counties there is a board composed of more than 30 members. In Arkansas, where the county levying court is composed of locally elected justices of the peace under the presidency of the county judge, this body is composed of 69 members in Pulaski County, the largest of the state. The defect of having a large governing body of this character is in some degree minimized in Arkansas by the fact that the county judge is to a great extent the real administrative head of the county. With a governing body as large and cumbersome as in the states just referred to, county government is almost certain to be ineffective.

[1] New York, New Jersey, Michigan, Wisconsin, and 84 counties of Illinois.

CHAP. XV

To some extent an effort has been made in Michigan to meet this situation by the creation of other county boards. For example, an elective board of county road commissioners composed of three members has been established for most of the Michigan counties, and this board is in charge of the expenditure of more money than all of the other departments of the county. Where the county serves as an important area for school administration, there is also, in many states, a separate county board charged with matters of school administration.

Other boards

The operation of county government through a large or small county board giving only incidental attention to the matter has not proved satisfactory; and, in the usual American fashion, when an institution does not prove satisfactory, it is left in existence, but a supplementary institution or board is created by its side. Following this plan, Indiana in 1899 provided that in each county there should be a county council of seven members, four to be elected by districts and three at large. The board of county commissioners in Indiana is composed of three commissioners elected from districts. The county council in Indiana has been given authority with respect to voting appropriations, fixing tax rates, borrowing money, and issuing bonds, and with respect to the purchase and sale of real estate. The county board of three members remains in existence as the executive authority for the purpose of carrying out the policy determined through the financial powers of the county council. Oklahoma has created for each county a so-called excise board, which levies all taxes, not only for the county, but also for all agencies and areas of local government within the county. This body was created in 1910, and is now composed of the county judge, county clerk, county attorney, county treasurer, county superintendent of public instruction, county assessor, and one county commissioner chosen by the board of county com-

missioners. Through the creation of this excise board, the financial powers of the county have been taken away from the elected county board, and have been vested in a group of independent and separately elected county officers. This plan has apparently not worked with entire satisfaction, either to the counties or to the other municipal corporations within the counties.[1] In Ohio slight powers of a character similar to those of the Oklahoma excise board have been conferred upon a board of budget commissioners composed of the county auditor, county treasurer, and prosecuting attorney. In the two New England states of Connecticut and New Hampshire county finances are controlled by a body known as the county convention. In Connecticut this body is composed of members of both houses of the state legislature, who are elected from a given county. In New Hampshire it consists of the representatives of the towns of a given county in the House of Representatives.[2]

County officers

The county board is by no means the sole authority in the county. There is a group of county officers, usually elected by popular vote and virtually independent of the county board. Rhode Island has only two county officers, the sheriff and the clerk of the court, both elected by the legislature. The other New England states have an average of about six county officers each, though the appointment of some of these officers is more common in the New England states than elsewhere. The one officer found in every county is the sheriff. There is also always a court clerk or a county clerk, who is usually secretary of the county board and has other miscellaneous duties. In four of the New England states this officer is appointed by the court. Nearly all of the states have a system of local prosecuting attorneys, and in most

[1] See Maurice H. Merrill, "County Government in Oklahoma," *Oklahoma Municipalities*, Vol. IV, No. 1 (March, 1920).

[2] See Frank A. Updyke, "County Government in New England," *Annals of the American Academy*, XLVII, 36 (May, 1913).

CHAP. XV

states the prosecuting attorney is an elected county officer. However, the title varies a good deal, and in a number of states (mainly in the South, but including also Colorado, Massachusetts, New Mexico, and Oregon) these officers are elected by and act in judicial districts usually larger than a county.

Other officers

County treasurers are provided in nearly all of the states, though in Connecticut and Vermont these officers are appointed. In most states there is a county judge or probate judge (or both) in each county; and also county recorders or registrars of deeds, and coroners. In the states outside of New England there will usually be found county surveyors and county school superintendents. In addition to the clerk of the county court, there are frequently additional clerks for probate, circuit, or other courts. County assessors and tax-collectors are found in many states, though in some these functions are vested in another county officer. In the states outside of New England there are county road commissioners or superintendents, and also poor commissioners or superintendents of the poor farm. These officers are usually appointed, but in a few states they are elected. A good many states have appointive county health officers. County officers are elected for terms varying from two to six years. In the states west of the Mississippi a uniform term of two years is usually provided for all county officers.

County employees

Elective officers are able to do most of the governmental work of small counties; but in more populous counties there will be found a large number of deputies, clerks, and other employees. In Illinois, for example, elective officers in some counties receive small compensation, and need to give only a small portion of their time to official duties; while Cook County has a permanent staff of more than 3,000 employees. County employees in most cases hold their positions at the pleasure of the elective heads of the several offices, or at the pleasure

of the county board; and these positions are usually disposed of as political patronage. In the larger New York counties, in several New Jersey counties, and in a few counties in other states the merit system of appointment has been applied to some extent.

Defects of county government

The two most serious defects of county government are: (1) organization upon the assumption that the governmental problems of all counties are uniform; and (2) the absence of any definite head or responsibility for all of the functions conducted by the county. County government was originally adapted to small rural communities, and most of the state constitutions contain detailed provisions regarding county organization, irrespective of size and population. State constitutions to a large extent prescribe the organization of county boards and the officers whom each county shall have. There are some alternatives and some conditions prescribed as to the number of officers for large and small counties; but, on the whole, county governmental organizations are cut from the same pattern, without particular reference to the needs of counties with varying problems and varying populations. Both of the defects of county government before referred to find their basis in detailed constitutional provisions, and in many states little can be accomplished toward a simplification of county government without constitutional change.

Constitutional provisions

Some state constitutions contain few or no limitations upon the type of county government.[1] Some constitutions contain provisions on the subject, but permit changes through statutory action. For example, the constitution of Nevada[2] provides that "the legislature shall have the power to increase, diminish, consolidate, or abolish" the group of county officers expressly provided for in the constitution. The constitution of Oklahoma[3] permits the list of county officers to be

[1] Kansas, Nebraska, Minnesota, Ohio, and Wyoming.
[2] Nevada Constitution, Art. IV, Sec. 32.
[3] Oklahoma Constitution, Art. XVII, Sec. 2.

CHAP. XV

changed by legislative act, and some slight use has been made of this power.[1]

Statutory changes

Although state constitutions to a large extent prevent the alteration of the structure of county government to meet the present needs of counties of varying size, the legislatures of all of the states have a good deal of power with respect to the precise form of county government; and something has been accomplished through legislation to simplify county organization. For example, in Kentucky a county is permitted by popular vote to constitute its fiscal court of three commissioners, elected at large, together with the judge of the county court, thus reducing the size of the county governing board. Louisiana by legislation of 1914 authorized the adoption of the commission form of government for counties, with the election of three commissioners at large for terms of four years, to take over the powers and duties of the police jury and to employ the subordinates of the county government. The statutory provisions in Louisiana and Kentucky were obviously based upon an adaptation of the commission form of city government. The commission form of government, as permitted by legislation in Louisiana, tended to simplify and give a more definite responsibility to county government; although the head of county government provided for in Louisiana was a commission of three members rather than a single individual.

Home-rule charters

California and Maryland by constitutional amendment expressly provide that counties may adopt home-rule charters, prescribing their own forms of government. Under this power the county of Los Angeles has adopted a charter which materially simplifies the organization of county government; and some other county reorganizations have taken place. The supervisors of the county are by constitutional provision re-

[1] Bunn, *Supplement to Oklahoma Revised Laws* (1918), Secs. 1749a, 1749m, and 1749n.

quired to be elective. The Los Angeles charter leaves the sheriff, auditor, assessor, and district attorney as elective officers, but authorizes the board of supervisors of the county to appoint the county superintendent of schools, coroner, public administrator, county clerk, treasurer, tax-collector, recorder, and surveyor.[1]

Tendencies toward a county executive

Under the powers vested in legislatures something has been accomplished toward giving an element of headship to county government. Each of the first-class counties in New Jersey has a supervisor, who is elected by the people of the whole county, and who has rather wide powers with respect to county government, although by no means full executive authority. By constitutional amendment in Colorado, the city and county of Denver were permitted to consolidate into one municipal corporation with power to frame its own charter. Denver in 1916 vested the appointment of city and county officials in the mayor. An element of headship in the county government is found in the state of Georgia, where the ordinary, an elective officer, largely performs the functions vested in a board in other states, and also has large executive authority with respect to the county. In the state of Arkansas the county judge is rather distinctly the chief executive officer of the county, with large powers. To a smaller extent the county or probate judge in Tennessee and Alabama is the leading county authority. In Cook County, Illinois, a definite element of executive leadership has been vested by statute in the president of the board of county commissioners. The president of this board is given an effective veto power and is authorized, with the consent of the board, to appoint a number of the important county officers. So far as concerns the activities of the county not under the authority of the elective county officers, the president of the county board of Cook County is the real executive

[1] For a description of the Los Angeles government see Gilbertson, *The County*, p. 172. The text of the Los Angeles county charter will be found in Gilbertson, p. 219.

CHAP. XV

head of the county. However, the elective county officers are completely independent of his control, and their officers and employees total many more than those under the direct control of the president of the county board.

Michigan

In the state of Michigan county government is now highly cumbersome. The chief authority of the county is a large board of supervisors made up of representatives of the townships. In addition there is the usual list of elective county officers; and there are separate boards, such as the county road commission, exercising a large part of the county authority. A movement is now on foot to amend the constitution so as to permit the vesting of all county authority in an elected commission consisting of from three to nine members, to supersede all existing boards and elective county officers. Under the proposed Michigan amendment it would apparently be possible for the legislature to provide for an elective commission and for the appointment of a county manager, upon the analogy of the city-manager system, which has in recent years been adopted in so many urban communities in this country.

Greater legislative power

The tendency is now toward a greater degree of flexibility in county government. In some states many of the present defects of county government may be remedied by legislation. In others the material simplification of county government requires constitutional change. Under the constitutional provisions of California and Maryland, permitting each county to adopt its own form of government, there is substantially complete freedom to alter existing forms of government. In view of the fact that the county is so important an agent of state government, it is likely, however, that the movement for county home rule, even in matters of organization, will not make rapid progress, and that the best opportunity is that of obtaining a greater degree of power in state legislative bodies with respect to this matter. The new Louisiana constitution, adopted in 1921, indicates what

may be done in this respect by providing that "the legislature shall provide optional plans for the organization of parochial government, and any parish may change from one plan, so prescribed, to another, when authorized by a majority of the electors voting at an election held for such purpose."[1]

Small counties

In the older states county lines have tended to remain permanent and are not likely to be changed with ease. Much may be accomplished to meet the needs of counties of varying size, through county home rule as to form of organization or through a power in the state legislature to submit to counties alternative and simpler plans for county organization. The small county is likely to remain, but it must be permitted to adopt a simpler and cheaper form of government to meet its particular needs. Simplification of county government is as important for the large as for the small county. The steps toward simplification have up to the present time been taken by counties of greater population; for simplification has appeared more urgent because of the larger governmental problems. Small counties may be aided also in the handling of their affairs by statutory provision for union of counties in the undertaking of certain types of county functions. In Michigan and Illinois, for example, statutes permit the union of counties for the maintenance of county poor farms. There seems no reason why, if constitutions permit it (as in most cases they do), counties may not be allowed to unite in connection not only with charitable activities but also in connection with health and school administration, the construction and maintenance of roads, and various other functions normally committed to counties. In this way a concession may be made to the sentimental desire to maintain existing county lines, while at the same time more effective units will be established for governmental work.

[1] Louisiana Constitution, 1921, Art. XIV, Sec. 3.

CHAP. XV

TOWNS AND CIVIL DIVISIONS OF THE COUNTY

New England town

The town is the chief area of local administration in the New England states. It is older than the county, and its importance as a local governing area and as an agency of state government has not been diminished by the creation of the county over the same area, with limited governmental functions. The New England towns have areas of from twenty to thirty square miles, and usually include both rural territory and more compact village settlements. About three fourths of them have less than 2,500 inhabitants each, and hence may properly be classed as rural communities. The smaller number of large towns present, however, the more serious problems of local government. Large communities become incorporated as cities, and generally the creation of city government terminates the existence of town government; though this is not true in Connecticut, where city and town governments coexist over the same territory. In general, it may be said that the New England town is the only body exercising powers of local government within the territory that it occupies. The local government functions of the county are negligible; cities are as a rule not within town boundaries; and in only a few cases are villages or boroughs organized within towns. The importance of the New England town as an organ of local government thus arises primarily from the fact that the town has substantially all the powers of local government within its boundaries; whereas in other parts of the country local governing bodies, for different purposes, and frequently with conflicting powers, usually occupy the same territory. While most New England towns are rural, the town government controls not only the purely rural areas but also the more compact settlements, and a number of towns have populations running well over 10,000.

The New England town has, by virtue of legislative

act, substantially all of the powers ordinarily possessed by a city government. The town meeting is its chief organ of government, and in the smaller communities the town meeting is both picturesque and useful. All citizens do not attend town meetings, even in the towns of smaller population; and in the larger towns, political organizations are likely to control. The town meeting not only elects the town officials but is also the legislative body of the town, and attends to many of the details of town government. It becomes ineffective when the town reaches a population exceeding several thousand, because all voters cannot attend. Brookline, Massachusetts, with a population of nearly thirty-eight thousand, has been permitted by legislation to adopt a system of limited town meetings, composed of representatives elected from precincts. Such a body lacks, of course, all of the elements of the original New England town meeting. An increase in governmental organization for the conduct of town business necessarily comes with the increased size of a town. Selectmen, usually three or five in number, constitute a sort of executive committee of the town meeting, with numerous powers but with no authority to enact by-laws. In addition, numerous boards have been created, such as school committees, boards of health and overseers of the poor. The town clerk is a salaried officer who does a large part of the administrative work of the town, and forms a connecting link among the numerous independent officers and boards. There is a whole group of minor officials, mostly elected by the town meeting, and serving without compensation. This type of organization is ineffective for the conduct of large and important governmental affairs; and the larger towns are tending to replace their numerous honorary positions by paid officials. Complexity of local government in New England is the result, not of overlapping areas, but of numerous officers and boards whose functions are uncoördinated. It is natural, however,

CHAP. XV

that the existing system should be difficult to replace, for even honorary offices ordinarily make their incumbents convinced advocates of things as they are. The present position of the New England towns has been well described by Professor W. B. Munro as follows:

"New England town government has three centuries of good tradition behind it and enjoys a splendid reputation, which, however, is not wholly deserved. Those who are not in close touch with the actual facts of the situation imagine that these towns are miniature republics left to handle their own local affairs in their own way, free from legislative interference, and governing themselves admirably by the device of a mass meeting. That is a pretty picture, no doubt, but far from being a true likeness.

"The New England town has in reality no more home rule than the New England city. It is buffeted in all directions by the action of the state legislature; and scarcely a year ever passes without new duties being thrown by the state upon town officers. The New England town has a form of government which serves well enough for a very small community where there are no important public services to be provided, where the people are all or nearly all of native stock, and where every one knows his neighbors. But in its application to places of several thousand inhabitants, and particularly to industrial towns which have a considerable proportion of foreign-born voters, it has no marked merits except those of age and good historical association. In point of actual accomplishment, it is no better than the newer forms of local government which exist in other parts of the country."[1]

Town system in other states

So-called town or township systems of government are found in the great central group of states extending from New York to Nebraska. The town or township, while in this area a district of considerable importance, is not nearly so important as in the New England states. Towns or townships in the older states of this group are

[1] This quotation is taken by permission of the Macmillan Company from Professor W. B. Munro, *Government of the United States*, pp. 566-567. This book should be consulted for a fuller statement regarding the New England town.

irregular in size and boundaries, and to some extent represent a natural growth. In the new states townships are ordinarily areas of thirty-six square miles based upon the congressional survey, though there are numerous variations from this rule. In Illinois, Missouri, and Nebraska will be found some counties organized on the township basis, and some not so organized. In Illinois 85 of the 102 counties are organized under the township system, each town electing a supervisor, and the supervisors forming the county board. The seventeen southern counties of Illinois are under a commissioner type of government similar to that of counties in the southern states. In Missouri and Nebraska a small number of the counties are organized under the township system. These three states represent conflicting types of local government, occasioned by the diversity of their original settlement. Illinois is the most typical in this respect. The Illinois constitution of 1848 required the General Assembly to provide an optional system of township government for counties; and this system has been adopted by all except a group of small counties in the southern part of the state, whose form of government is still controlled by southern influences.

Character of township

The township in the group of states here under discussion is chiefly rural. In a number of the states, cities and villages are independent of the township. In all of them compactly settled districts are separately organized as cities or villages, and within their borders exercise the most important functions of local government. However, in most states the city or village remains a part of the township within which it lies. This is true of Indiana and Illinois, though in Illinois provision has been made by which township government within the city of Chicago and certain other larger cities of the state virtually disappears. On the whole, however, in Indiana and Illinois the city or village does not exclude the township government from its limits.

CHAP. XV

Types of township government

The forms of township government may be classified as follows: (1) Those which, as in New York, have the town meeting and township representation on the county board; (2) those, as in Minnesota, which have the town meeting but no representation on the county board; and (3) those, as in Pennsylvania, which have merely a local township organization, but no representation on the county board and no town meeting.[1]

Town meeting

A definite effort has been made to transplant the New England town meeting to a number of the central states having the township system.[2] The town or township is usually a district without any distinct community life or consciousness; and the tendency has been to reduce the importance of the township as an organ of local government. Because of the absence of any distinct self-consciousness as a unit of government, people living within the township do not largely attend the town meeting. The town meeting, too, is less important in these states than in New England, because of the fact that the more important functions of local government are likely to be handled by other local areas. Not only this, but in most of the states having the town meeting the town government has never been so important as in New England, even before the establishment within the town of incorporated cities and villages. Only a part of the states having the township system have provided for town meetings; and in these states the town meeting has not proved an effective means of local government.

Town government

Town affairs in the central and middle-western states are to a large extent administered by elective officers. At the head of the township will be found a single officer in some states and a board in others. There are in addition elective officers, such as clerk, treasurer, and assessor. The township is often also the school area, as

[1] See James, *Local Government*, 269.

[2] This is done in New York, New Jersey, Michigan, Wisconsin, Minnesota, in the 85 Illinois counties having the township system, and in the small group of Nebraska counties having this system.

in Indiana, and the road area, as in Illinois and some other states. However, in Illinois road affairs are somewhat separately administered within the township, and there has been a very definite tendency to make the county, rather than the township, the chief organ of road administration. Ordinarily, when the township is an area for school government, the schools are under authorities independent of the regular township authorities; though this is not the case in Indiana. To some extent the township is a local agency for poor relief. The township is also generally the local area for the election of justices of the peace and constables, and is in this manner the smallest local agency for the administration of justice. It is by no means uncommon for justices of the peace, although elected from the township, to have jurisdiction throughout the whole county.

Weakness of township

The township has not proved an altogether satisfactory organ of local government in the central and middle western states. This is partly due to the fact that it has not been given an opportunity to serve as the single unit of local government. Functions of local government are given to other local areas, and the tendency has been to create new and special agencies for particular local functions as needs develop. Not only is this the case, but with respect to many matters the township has proved too small an agency for the efficient performance of the functions of local government. In Illinois there has been a distinct tendency toward the transfer of functions from the township to the county. The functions of the county have been steadily enlarged with respect to charity administration, roads, the assessment and collection of taxes, and schools. The congressional township of thirty-six square miles is of some importance because of the federal grants of land for school purposes within such areas; but the civil township is often not of the same area as the congressional survey township. In Illinois the congressional township (whose

CHAP. XV

boundaries are often different from those of the civil township) is a local organ for school financial administration, although as such an organ it is not so important as the county.

Other local areas

As has been suggested the township is of less importance in the central and middle western states because of the tendency to split up functions of local government and to create new areas for the performance of each new function as it develops. In this manner there have developed park, sanitary, drainage, and other types of districts. In the middle western states that have not already adopted it there is a tendency toward making the township the primary area for school administration, as opposed to the smaller school district. But this tendency does not always make the township government itself more important; for usually a separate organization is set up in the township for the administration of schools. That is, school administration is not regarded as a part of the township government, even when the township is also employed as the primary area for school purposes.

Townships in the South and the West

Efforts have been made to introduce the township system in the states of the South and of the West. The chief effort to do this in the southern states came after the Civil War, and was associated in the minds of the citizens of those states with the reconstruction movement. However, the name "township" as a subdivision of the county for purposes of local government still exists in North and South Carolina, Missouri, and Arkansas. Constitutional provisions will be found authorizing the township system in a number of the farther western states,[1] though no real townships have yet been established in these states. The need for township government has not been felt in the southern and farther western states, because the population is more scattered and

[1] California, Colorado, Idaho, Montana, Nevada, Oregon, Utah, Washington, and Wyoming.

there are fewer functions of local government to be performed. People going to a new territory from older states naturally desire to employ names with which they are familiar, and think it possible to establish institutions that may have been proper under different conditions in the older states. Experience, however, rejects an institution created by statute in imitation of other states but unsuited to local government needs under different conditions. The legal institution may remain, but it does not function. This is clearly true as to the term "township" found in the South and the farther West. The name is there, but the institution is not. The same statement, however, applies to a great extent to the township organization as it exists in some of the central and middle western states.

County-subdivision in the South and the West

In the South and the West the counties are divided into subordinate districts, largely for administrative purposes; and such districts usually have little, if anything, of independent authority in the field of local government. In the South such districts have varying names. They are called "townships" in North and South Carolina, Arkansas, and Missouri; "magisterial districts" in Virginia, West Virginia, and Kentucky; and "election districts" or "precincts" in Florida, Alabama, and Maryland. In many of these states such areas serve as county subdivisions for the election of members of the county board. In the western states county subdivisions are most commonly called precincts. Subdivisions of the counties in the South and the West are ordinarily larger than the towns and townships in New England and the central states, and are more distinctly subordinate to the county. In the South and the West school districts are usually also merely subordinate divisions of the county for administrative purposes; and school districts are usually under a somewhat independent county organization for school government.

CHAP. XV

Summary

The New England town is the one important local government area outside of incorporated cities and villages. In the central and middle western states the town or township is to some extent an independent unit of local administration, but with limited powers and often a good deal of subordination to the county. The work of government in these states within the county is largely done by incorporated cities, villages, and special districts, and not by the townships. Not only this but in many of these states the county has tended to become more and more important, both as a state agency and as an area of local government; and in many fields governmental functions have been transferred from the township to the larger county unit itself. Local subdivisions in the South and the West are in the main subordinate to the county and are its subdivisions for the conduct of county work. In the South and the West there are also incorporated cities and villages, which attend to the more important functions affecting compactly settled communities; and there are also many special districts which perform particular functions of local government. Problems of local government are more concentrated in New England and in the central and middle western states; and this difference in problems is chiefly responsible for the difference in fact in the organization of local government. However, in many of the central and middle western states the problems of local government in rural communities are not dissimilar from the problems in New England, although they are differently handled.

CITIES AND VILLAGES

Proportion of city population

The growth of urban population has naturally and necessarily led to the development of cities with large powers as the chief agencies to meet local needs occasioned by more compact population. The population

of cities of more than 100,000 in 1920 was nearly 26 per cent. of the total population of continental United States. The problem of governing compactly settled areas is, of course, much greater than this, for 43 per cent. of the population in 1920 lived in cities of more than 8,000 inhabitants. The United States Bureau of the Census classifies communities having 2,500 inhabitants or more as urban; and by the census of 1920 more than 51 per cent. of the population lived in such communities.

Meaning of term "city"

The term "city" has no definite significance. Many state laws specify that no territory may be incorporated as a city unless it has a population of at least 1,000 within a fairly limited area. The term "city" is legally used to designate communities ranging from small population to millions of inhabitants, and incorporated with large powers of local government. The problems of city government naturally vary with the size of the community. Most of the states by law provide for the incorporation of small communities as villages, with a simpler type of government than that provided for cities; yet the line between city and village is in no way sharply defined. The term "city" legally applies to many small communities whose problems are largely rural. There has been too much of a tendency to regard the problems of city government as a unit, and to mold all institutions legally known as cities into a common form. This tendency, however, has not been controlling within recent years.

Forms of city government

A brief statement may here be made of the chief forms of city government in the United States. These forms are primarily three: (*a*) the mayor-council, or federal, plan; (*b*) the commission plan; and (*c*) the commission-manager plan.

Mayor-council form

The mayor-council or federal plan is still the most general in this country. It is to a large extent organized upon the analogy of the national government. There

CHAP. XV

is a popularly elected mayor with large powers, which have tended steadily to develop. The mayor normally has a veto power and a fairly large power of appointment; although several of the more important officers, such as clerk and treasurer, are usually elected by the voters of the city, just as is the mayor. There are ordinarily under the mayor a group of departments whose heads are appointed either by the mayor alone or by the mayor with the approval of the council. In imitation of the plan of the national government, there was an early tendency in some states to organize the city council upon the bicameral system. The bicameral plan has, however, steadily tended to disappear, and has already vanished from all of the great cities of this country. Usually there is now a council composed of a single house, whose members are more generally elected from wards into which the city is divided; although occasionally some or all of the members are elected from the city at large. In the mayor-council plan the chief tendencies have been toward the enlargement of the powers of the mayor, and a corresponding reduction in the powers of the council, though many municipal boards exist, some of them under the control of the council. There has also been a tendency under this system toward some simplification in government, particularly with respect to the city council.

Commission government

The commission government plan for cities had its origin in the city of Galveston in 1901, after the disastrous flood which came very near destroying that city. The fundamental characteristic of this plan is an elective commission, usually of three or five members, having large municipal powers, both legislative and executive. The value of the plan is that it treats the city government as a unit and seeks to establish a responsible head for that government, through the choice of a commission responsible for all of its affairs. Each of the commissioners is the head of a department, and there

are as many main city departments as there are commissioners. Although this plan constitutes in many ways an advance over existing forms of city government, in that it recognizes the task of governing the city as a single task, it is seriously defective because it assumes that the problems of city administration may properly be handled by elective members of a commission, chosen without regard to their competence in the fields in which they are to administer. It is a plan of elected administrators to carry on the somewhat distinctly technical functions of the city government. Along with this system has come ordinarily the initiative and the referendum on municipal ordinances, and a power to recall the members of the commission by petition and popular vote.

Commission-manager plan

The so-called commission-manager type of city government had its origin about 1912, though it first received serious consideration upon its adoption by the city of Dayton, Ohio, in 1913. More than two hundred cities in the United States are now governed under the commission-manager plan. Under this plan there is a small commission or council, whose members are usually elected from the city at large. This body determines the policy of city government, and selects a manager to administer the affairs of the city. One element in this plan has been that the manager should hold office as long as he gives satisfaction to his employers, and that in his choice there should be no limitation to the territory of the city itself. Through these elements of the city-manager plan there has already tended to grow up a profession of city-manager, with the possibility of a manager who is successful in a smaller community being chosen to serve in a larger city. While the initiative, referendum, and recall came largely into city government with the commission plan (although forming no essential part of that plan), proportional representation in the election of the commission or council tends to be

CHAP. XV

found with the commission-manager plan as adopted in some cities, although also forming no essential part of that plan. The commission-manager plan has been devised for the purpose of establishing a more definite responsibility for city administration, and may be said to have accomplished this result. Through the commission government plan, which really originated in 1901 and which for perhaps fifteen years had great sway in American city development, and through the commission-manager plan, which originated in 1912 and has in recent years tended to replace the commission plan, much has been done since 1901 toward the reconstruction of city government in this country.[1] It is of some interest that these improvements in city government were largely developed as the result of great catastrophes in Galveston and Dayton.

Lines of improvement

The chief contribution of the commission plan has been the introduction of a small number of city departments, and as a consequence a simplified administrative organization, under a single control; while the commission-manager plan adds a better control over the administrative organization. Both of these plans result in abolishing numerous independent offices, boards and commissions that have been set up in city government. The improvement of city government thus follows much the same line as the reorganization of state government; although the movement for the reorganization of city departments preceded that in state government.

Functions of the city

The city is the most important agency for the doing of tasks of primary interest to the residents of the local community. In all states cities have large powers to enact local ordinances. Within its boundaries the city is usually the chief agency for health, police, and school administration; and the very compactness of city popu-

[1] The commission-manager plan is now recommended by the National Municipal League, and its recommendation has had much influence in occasioning its rapid adoption. The essentials of the plan are best set out in a model city charter prepared by the National Municipal League.

lation makes these functions different from the same services in rural communities. For the same reason, the city has important problems of fire protection, water supply, safety of building construction, sewerage, lighting, and street-paving. Within the limits of a city, municipal ordinances determine large issues of public policy; and important administrative problems must be met and solved. A great city will need and have many more employees than the largest state; for the city is the agency for the direct administration of important services, whereas the functions of the state are largely supervisory. The city of Chicago, for example, has more than 30,000 employees, while the state of Illinois has not more than a third of that number. The administrative problems of the city are not dissimilar from those of the state; and they require a definite and single responsibility in those at the head of the city's activities. For some states as a whole, and for many individual cities, civil service plans have been adopted for the choice of city employees. Civil service provisions commonly accompany the adoption of the commission or commission-manager plan. In the purchasing of supplies and contracting for services, a great city has larger problems to deal with than does any state and the movement for improvement in these respects originated in the cities rather than in the state governments.

Special problems of the city

The serious economic and governmental problems of great cities are complicated by a large immigrant population. At the same time, groups of suburbs have grown up around great cities; and many of the people competent to exercise civic leadership have moved their residences beyond the territorial limits of the city, while retaining their business or professional interests within its limits. These are problems of interest not merely to the city but to the state as a whole.

Municipal powers

In the discussion of city government there has been a tendency to emphasize the functions of the city as an

CHAP. XV

agency merely for government within its boundaries; and the development of municipal home rule, both as to the powers and the organization of cities, has been a result of this tendency. But the functions performed by a city are of interest not only to its residents, but also to the people of the state at large. There is need within cities for a single control as to all functions of government, both those performed as a local agency for the residents of the city, and also those performed by the city as an agency of the state government. The functions of the city as an agent for its own citizens and as an agent of the state can not be separated. Outside of the states that have conferred municipal home rule as to local powers, city government is still a government whose powers are limited to those enumerated by state statute. The movement for municipal home rule has been important in that it has emphasized the city's need for general powers of local government. When the city's powers are explicitly enumerated by state statute, the city must in each case go to the state legislature for an enlargement of power when it needs to perform a new task. Under the plan of detailed and enumerated powers, cities have constantly been subject to the whims of state legislatures. When an immediate need for action presents itself, the city must wait until the state legislature is in session. Even without the constitutional establishment of municipal home rule as to city powers, it is possible to abandon the traditional policy and to provide by law that cities shall be presumed to have all powers of local government except where such powers are denied. It is unwise to adhere to the principle that cities are presumed to have no powers except those that are granted by legislative act. This reversal of principle has been accomplished in some states by constitutional provision for municipal home rule as to city powers. Constitutional provisions setting up certain municipal powers free from state legislative control may lead to unde-

sired results, because preventing the exercise by the state of powers that it should have in the interest of the state as a whole.

Methods of creating and changing city government

In the past twenty years there has been a rapid reconstruction of city government. This has been possible because of the fact that the organization of city government has not been difficult to change. In some states special charters are still possible. In those states, when a city has been able to bring sufficient pressure, it has been able to obtain a charter through which its government may be reorganized. The special charter plan is, of course, open to the serious disadvantage that what the state legislature has given it may as readily take away. In the states that do not permit special charters, something has been accomplished through general laws giving to cities wide powers as to the details of their local organization. In some cases it has been possible for cities under broad statutory powers to simplify their government by municipal ordinance, although the possibility of complete reorganization in this manner is not great. In a number of states legislation has been enacted permitting cities to adopt alternative plans of government; and among these alternative plans have come to be the commission plan and the city-manager plan. Through "local option" votes, cities are thus able to adopt what pleases them best from among several plans of government prescribed by statute. Finally, there is, of course, a group of municipal home-rule states. In these states the cities have substantially full power to frame their own charters and to prescribe their own forms of local government; not only the initiative but the power to act is in the hands of the city itself. Through the exercise of such powers, cities have adopted their own charters, but have in general adhered with a fair degree of closeness to one or another of the types of municipal government outlined above. The problem of home rule has been more fully discussed in Chapter

CHAP. XV

III. What has just been said relates to the changing of municipal organization, once a city has been created. Many of our present city governments were established by special charter, before the general prohibition of local and special legislation for cities. At the present time cities are usually created under the terms of general state law, through a petition followed by a popular vote in the territory affected.

Villages

Little need be said separately regarding village government, although the village type of government controls a large number of places and a considerable proportion of the population. Usually for a village there is a small board of trustees elected by the voters of the village at large, although sometimes by wards, together with a president of the village elected by the trustees or directly by the voters. The powers of villages are usually broad, but their problems are smaller than those of cities and their organization is simpler; though the tendency of village government is to conform somewhat closely to the forms of city government. Many states, for example, have authorized villages to organize under the commission or the commission-manager plan.

SCHOOL AREAS

School districts

The tendency before 1890 was to have small school districts, each with a board, and each independent in the management of schools within its territory. This system has proved wasteful and inefficient, although it is still in use in nearly one third of the states. In earlier days there was some justification for a small school district operating a one-room school. Better roads and better means of transportation have destroyed such a justification. Larger areas of territory can now be better served by consolidated schools, with provision, where necessary, for the transportation of pupils.

County as a school unit

More recently there has been a tendency to use existing areas of local government for the purpose of school administration. The use of the county as the chief local area for school administration will be found mainly in the South and in some western states. Kentucky has a modified county system. More than one third of the states now employ the county as the chief local unit of school administration. In these states there is in each county an elected county school board or an elected county superintendent, or both. The school administration is in substantially all cases independent of the regular county government. The organization in Florida is somewhat typical of this plan. There the county board of education is elected by the voters of the county, as is also a county superintendent of schools.

Town as a school unit

In a number of important states, including those of New England, the town or township is the chief local unit for school administration. In Virginia and West Virginia the same result is accomplished through the use of the magisterial district as the local school unit. In Indiana the school administration is perhaps more closely related to the government of the township than in other states. In this state the township trustee is both a civil and a school officer, and the township trustees together elect the county superintendent of the county. There is also an elected advisory board in each township.

Cities and villages

To a large extent, cities and villages are in control of school affairs within their borders; although here also there is often a substantially independent administration of schools through a separate board. In Illinois, however, the school-district system covers not only rural areas but also cities and villages as well. School districts are often not coterminous with cities and villages. Chicago is by law made a separate school district, with a school board appointed by the mayor; and special laws

CHAP. XV

enacted before 1870 are in some cases still in force providing for school administration by particular cities.

Defects of school districts

The administration of schools through small school districts has serious disadvantages; and, where it exists, efforts are made by one means or another to obtain larger units for school administration. The school system of Illinois presents one of the most complex situations. The small school district is in Illinois the chief unit of school administration. In more than 2,500 of these districts, schools are operated with less than fifteen pupils apiece. The school township (the 36-square-mile survey congressional township) has a board, and has some fairly important financial functions in connection with the school system; although the survey township is in many cases not the same as the civil township. The survey township is used chiefly because of the federal land-grant system, based upon the township survey. The county has tended to become in many ways the most important local agency of the state for purposes of school administration; and through the county the state superintendent of public instruction keeps in touch with the local school system. Legislation has been enacted for the establishment of township high schools, and of consolidated schools in the effort to get away from the district plan. Through the creation of various types of larger districts, Illinois avoids to some extent the disadvantages of the small-district system; but in order to accomplish this purpose the state is overlaid with numerous types of school districts, many of which cut across the boundaries of others. A struggle has been going on for some years in Illinois to establish the township as the chief local area for school administration; but this attempt has so far failed, and the small-district plan of school administration is gradually being broken down by legislation permitting larger areas for high schools and the consolidation of small districts.

Present tendencies

The present tendency in school administration is to use for school purposes areas created and existing for general governmental purposes, but the schools are usually administered by separate boards and officials. The county and the township have tended to become the most important local areas for school purposes, but this by no means indicates that the general township and county governments have powers with respect to the school system.

SPECIAL DISTRICTS FOR OTHER PURPOSES [1]

Creation of new districts

The development of local government has been toward a multiplication of local areas, and of substantially independent governing bodies within the same area. Each activity of government desires an independent area or organ. The same influences have operated here as operated in the building up of a highly complex state administration, with numerous independent officers having overlapping functions. There has been a superimposing of local areas one upon another, with some degree of overlapping functions. This is not so true of rural New England as of other parts of the country, although in the New England town separate boards or officers have been created for different functions without much control by any one officer within the town. Independently of the districts or areas established for general governmental purposes, local areas will be found in many states for schools, parks, drainage, and various other purposes. In cities and incorporated villages many of the important functions of government are exercised by the single incorporated area, though in many cases the territory occupied by the city or village government is at the same time covered by separate school, park, and other districts. In North Carolina provision has

[1] For a full discussion of this subject see a monograph by Dr. F. H. Guild on *Special Municipal Corporations*, soon to be published by the University of Illinois.

CHAP. XV

been made by statute for the incorporation of "rural communities" with relatively large powers as to roads, schools, health, and other matters. Such rural communities are to have annual community meetings of registered voters, and are to choose three persons to be known as a board of directors of the community.[1] The North Carolina legislature is apparently not afraid to consolidate the functions of rural government into a municipal corporation with large powers, whose organization is based somewhat upon that of the New England town. However, the "rural community" in North Carolina does not take over the functions of the "township," which is provided for by the state constitution, and whose locally elective officers have certain functions in connection with local government.

Rural areas

The problem of numerous local areas exercising governmental authority over the same territory is not one of urban government alone. The complications arising from numerous and overlapping local governing areas over the same territory appear more serious in large urban communities like Chicago and Los Angeles, because the specific problems in the one locality are greater. However, the complications of numerous overlapping areas or districts are no less serious in rural portions of the country. In Arkansas, for example, there are three types of subdivisions of the county, and the boundaries of one subdivision are usually not coterminous with those of either of the others. Each county is divided into townships, the townships electing justices of the peace and constables, and the justices of the peace acting as members of the county board. The township, however, has few independent powers of government. The county is also divided into road districts, which are chiefly subdivisions of the county for convenience in the county's administration of the road system, though certain statutory provisions regarding funds of road

[1] North Carolina Consolidated Statutes (1919) II, Secs. 7380-7393.

districts prevent the county from having anything like complete authority. In addition, the county is divided into school districts, whose administration is chiefly under the control of an elected county board of trustees, the county board itself choosing the county superintendent of schools. Most of the territory of rural Illinois will be found not only in a civil township but also in an independent school district, and probably also in park, drainage, or other types of districts. The consequences of this overlapping of various areas in rural territory are not so obvious; but in the aggregate they are more serious, because each task of government in the rural communities is smaller, and the splitting up of these tasks among various local governing bodies makes it substantially impossible to perform any one of the functions of local government efficiently.

Local option laws

Many special types of districts have been created by action under "local option" laws. State legislation authorizes the local creation of districts as the result of petition and popular vote. The state law lays down a general policy as to the creation of such districts; but the state maintains no supervisory control over their creation, or over the relationship of such newly created districts to existing areas. In some states there is no office of the state government having even a list of districts so created; and of course there is no way of knowing the results of the legislative policy with respect to the establishment of such districts.

RELATIONSHIPS AMONG AREAS COVERING THE SAME TERRITORY

Legal and practical relationships

Usually, when a new area of local government is created in territory already occupied by one or more existing areas, little or no attention is paid to the probable relationship between the new area and those previously existing. The relationships among areas of local government covering the same territory are to a large extent

CHAP. XV

relationships of fact rather than of legal rule. When a large city grows up within the limits of a county, the county usually loses little, if anything, of its legal powers within the limits of the city. But the county in fact tends to perform fewer functions within the city's territory. The sheriff of the county will ordinarily have as full and complete authority within the limits of the city as within the territory outside of the city; yet the city has organized a police force of its own. The sheriff naturally tends to devote his attention to the portion of the county lying outside of the city, relying upon the police of the city to handle matters within the city itself. Similar practical relationships establish themselves with respect to many other functions. Of course the city legally takes over functions that might to some extent otherwise be exercised by the county government. For example, in a great many cases the city is within its borders the local agency for school administration. If the county is the general agency for this purpose, the city may to a large extent, or almost completely, replace the county in connection with this function, both as a matter of fact and as a matter of legal power.

City-county consolidations

In view of the growth of great cities and the confusion occasioned by conflict of city and county powers and the duplication of governmental organization, there has been an effort to work out more satisfactory relationships between these two organs of local government. The avoidance of confusion has been sought in Virginia through a constitutional provision excluding all cities from the limits of counties. The city governments exercise all county functions within their own limits. Several state constitutions have provisions authorizing larger cities to be organized as counties, though little or no use has been made of such provisions In Minnesota cities of 20,000 may be so organized; and in Michigan and Missouri cities of more than 100,000. The California constitution authorizes city and county consolidation,

and makes special provision for San Francisco and some other counties. Under the authority of constitutional provision an effective consolidation of city and county government has been brought about in Denver. Baltimore, St. Louis, and San Francisco combine county and city functions, although in these communities there is no complete merging of the two types of government. Philadelphia is both a city and a county, but it has substantially two sets of officers for the exercise of two sets of functions.

Difficulties of consolidation

Movements for city and county consolidation have been going on in a number of the larger cities, but many difficulties present themselves. In a number of states the consolidation of cities and counties, or the setting up of large cities as separate counties, is prevented by constitutional provision. But in most of the states constitutions can be amended without great difficulty; and practical obstacles to consolidation are often more serious than those presented by constitutional provisions. Every great city is likely to have surrounding it a group of suburban communities—communities which have been termed "satellite" cities. These communities are inhabited in the main by people who have their businesses in the great central city, but who do not desire to live in the more congested city, and who also do not desire to assume any of the burdens of government with respect to the city itself. These communities develop a rather distinct type of exclusiveness, and are often unwilling either to become parts of the city or to permit the city to separate itself from the remainder of the county of which they are a part. Something has been accomplished in a few communities toward readjustment and the consolidation of county and city functions; but the difficulties are great, and progress chiefly remains for the future.

Efforts to coördinate activities

Something toward the simplification of local government for urban communities may be accomplished by city and county consolidation. But more is needed. Not

CHAP. XV

merely should there be city and county consolidation or the setting up of great cities with county functions, but there must almost of necessity come the development over each part of the territory of the state of a single local agency, performing all of the functions of local government for that territory, but also acting as the agency of the state government therein. Some specialized districts may be desirable, in view of specific needs, and some overlapping and superimposing of local areas is likely to continue for a long time. Certain makeshifts have already been adopted in the effort to coördinate to a great extent the activities of local governing bodies acting over the same area. In Illinois, for example, an act was passed in 1901, with respect to local tax rates, which provided for the scaling down and adjustment of rates of all taxing bodies within the county by the county clerk. This law has proved entirely ineffective. One by one, the various taxing bodies within the state have obtained amendments exempting them from this scaling process, so that only a few of the more friendless bodies are now subject to the scaling; and the whole plan is one that presents pitfalls in levying taxes and enables larger tax-payers to escape taxation through judicial contests. In Ohio each taxing body is required to prepare and submit an annual budget to a board of budget commissioners. Limits are imposed upon the tax rate of each local taxing body and are enforced by this board. This plan seems to have worked little better than that of Illinois. The county excise board in Oklahoma receives financial statements and itemized budgets for the county and for taxing bodies within the county, and is charged with the levying of taxes for such bodies. The excise board may revise estimates by striking out, decreasing or increasing specific items or by the addition of new items; but the Oklahoma plan has not worked satisfactorily. In Oregon a tax supervising and conservation commission was created in 1919 for Multnomah County. This body is

purely advisory, but has authority to examine annual budgets, hold hearings, report findings, and make recommendations as to all of the taxing bodies within the county.[1]

CHIEF PROBLEMS OF LOCAL GOVERNMENT

Simplified government

The chief problems of local government are twofold: (1) reduction in the number of areas; and (2) simplification in the government of local areas. Local government is a single problem, and the position of any one local area can not be considered without reference to the others. Oddly enough, the first book to treat local government as a single problem appeared in 1921; and even this book tends to treat different types of local government as if they were independent.[2] In order to establish efficiency in local government, it is necessary that there be, wherever possible, but one area of local government over the same territory. This ideal can not be achieved at once, and special types of districts may for a while be necessary. The single unit of local government established over a particular territory must not be too small. The tasks committed to it must be large and important enough to interest the people whom it governs. There has been a good deal of shifting upwards of functions of government. Certain specialized types of governmental activity, such as those relating to the care of the insane, are now regarded as primarily state functions and the local communities have ceased to act in these matters. In other matters there has been a tendency to shift from the township to the county. In Illinois, for example, there has been a definite tendency to make the county, rather than the township, the chief unit of government

[1] For an account of this commission see Henry E. Reed, "County Government in Oregon—A Growing Problem," *National Municipal Review*, X, 95 (1921).

[2] Herman G. James, *Local Government in the United States* (New York, 1921).

CHAP. XV

with respect to roads, charities, and taxation. There has also been a definite tendency to abandon the older plan of a small school district, and to make the town or township or the county the chief unit for local school administration.

No one plan possible

No one plan of simplified local government can be adopted for all the states or for any one state. The problems of local government are complex and variable. In one area a modified and simplified plan of county government may be satisfactory; in another a city government taking over county functions; and in another a federation of urban areas such as was proposed for Alameda County, California. In the organization of government for local areas, some degree of home rule is proper and desirable, although home-rule powers independent of legislative supervision involve dangers, particularly if the same organization is to serve within its territory not only as the only local governing body, but also as the only local agency for the performance of state functions. Much has been accomplished already toward the simplification of city government, but more remains to be accomplished; and little has yet been done toward a simpler plan of government for other local areas. The administrative problems of larger counties and cities are much the same as those of the state, and need not be again analyzed. It must be understood that the mere simplification of government for each of the present local areas would usually still leave a complicated system of local government, for three or four, or more, simplified local governments acting over the same territory with duplicate organizations and conflicting powers would themselves constitute the most serious complexity.

Constitutional obstacles to simplified government

There are certain serious obstacles to the reduction of local areas and the simplification of their government. The county problem is largely constitutional. There are constitutional limitations as to boundaries and as to form of government. The progress of the city toward

simplified government has been greater, not only because of the greater interest in city government, but also because of the fact that there have been no serious constitutional barriers to be overcome. However, the tendency to place in constitutions detailed provisions as to municipal home rule and other matters, while obtaining constitutional protection for results already achieved, may tie our hands in the future in the field of city government as well. Constitutional provisions regarding municipal debt limits, while not interfering with the simplification of city government, do to a large extent interfere with the consolidation and readjustment of local governing areas.

Other obstacles

While there are constitutional obstacles to a better organization of local government, there are other obstacles almost equally as serious. Inertia is one of the most serious obstacles to be overcome; though it has to some extent been overcome with respect to city government. In addition, certain interested opposition will always be found to the abolition of numerous local offices in order to obtain a simplified government. Every local officer of school district, township, or what not, usually constitutes a member of a fighting force to preserve things as they are. This attitude is natural, and need not be attributed in any way to sinister or dishonest motives.

RELATION OF LOCAL GOVERNMENTS TO THE STATE

Duty of the state

The state uses, and will continue to use, local areas for the performance of its functions. The line is by no means clear between state and local functions, and the two functions are often combined in the performance of the same task. Not only this, but all local areas render services governmental in character, through the exercise of governmental powers. The state is therefore interested in all of the functions performed by local governing areas. This interest is greater in some of

CHAP. XV

these functions than in others, but, irrespective of the type of function, the state has both an interest and a duty with respect to the proper conduct of local affairs within its borders.

Functions of the state

Details of organization of local government must vary, and local initiative should be largely uncontrolled as to matters chiefly of local interest. But the state must share in, and exercise some supervision over, the performance of all governmental functions within its borders, leaving local autonomy wherever possible. The state is interested not merely in health, police, schools, and certain other major functions of government, but also in the effectiveness with which local communities carry on functions with respect to drainage, park facilities, street-paving, and other matters that are more commonly regarded as local in character. With a simplification, we may expect not only the establishment of effective local government, but also the working out of more satisfactory relationships between state and local government for the performance of all governmental functions within the state's borders. Effective relationships between the state and its local areas will be facilitated by the establishment of a local administrative organization paralleling as closely as possible that of the state government. And state supervision over local areas must be organized as a continuous and constructive control. The performance of local functions will be injured rather than aided by interference based on political grounds or motives, whether that interference is exercised through the legislative or the executive department.

NOTE TO CHAPTER XV

Upon the subject of this chapter the only book covering the entire field is Herman G. James, *Local Government in the United States* (New York, 1921). Upon the subject of local government outside of cities the most satisfactory books are J. A. Fairlie, *Local Government in Counties, Towns, and Villages* (new edition, New York, 1914), and K. H. Porter, *County and Township Government in the United States* (New York, 1922).

The best discussions of city government will be found in two books by W. B. Munro: *The Government of American Cities* (third edition, New York, 1920); and *Principles and Methods of Municipal Administration* (New York, 1916).

Problems of local government vary so much from one state to another, and from one community to another in the same state, that opportunity exists for a large number of special studies. In making such special studies, it will be of value to determine the areas for school government; areas created for special purposes; and the influence of local option laws. Little has been done anywhere in the country toward a careful study of the relationships of governmental areas covering the same territory. Consolidations of local areas should be made the basis of special studies in the several states. In this connection it will be well to analyze the respective influences of constitutions, of statutes, and of local sentiment. The simplest case for the study of these influences is that involved in the creation of counties and the removal of county seats.

Upon the problems of municipal home rule, of local government, and of city and county consolidation, satisfactory brief accounts will be found in the Constitutional Convention bulletins published by the Illinois Legislative Reference Bureau. Bulletin No. 6 deals with the subject of municipal home rule; Bulletin No. 11 with local government in Chicago and Cook County and with consolidations proposed or effected elsewhere; and Bulletin No. 12 with county and local government in Illinois.

Upon county government satisfactory accounts will be found in Fairlie and James. An interesting book by H. S. Gilbertson, on *The County: 'The Dark Continent' in American Politics,* was published in 1917 by the National Short Ballot Organization. It contains much material that can not be found elsewhere. The *Annals of the American Academy of Political and Social Science* for May, 1913, presents a series of articles upon county government, giving a great deal of material that can not be found elsewhere. For discussions of county government in specific states reference may properly be made to the following studies: Herman G. James, "County Government in Texas," *University of Texas Bulletin* No. 1,732 (June 5, 1917); Maurice H. Merrill, "County Government in Oklahoma," *Oklahoma Municipalities,* Vol. IV, No. 1 (March, 1920); "County Government and County Affairs in North Carolina," *University of North Carolina Record, Extension Series,* No. 30 (October, 1918); *Bulletins of Massachusetts Constitutional Convention,* Bulletin No. 8, "County Government in Massachusetts." Reference has been made above to the general discussions in the Illinois Constitutional Convention bulletins. These bulletins give a full analysis not only of local government in general but also of Illinois local government in detail.

For current information regarding local government the *National Municipal Review* is indispensable.

CHAPTER XVI

STATE FINANCE

THE NATURE OF STATE EXPENDITURES

Public and private business

GOVERNMENT is not business, and the operations of government can not be judged by the same standards as are business enterprises. The test of business success or failure is profit or loss. But this test is not applicable to the performance of most governmental functions. However, a successful private business knows what results it obtains for its expenditures; and it is possible to apply this test also to government operations.

Business enterprises of government

Some functions of government may be tested by the standards of profit and loss; but even those that may be so tested are, because of their assumption by government, different from the same functions when performed by private business enterprise. The purpose of government in engaging in such functions is not profit, although one of the tests of governmental success may be profit or the absence of loss. If government is engaged in a commercial or industrial enterprise similar to that of private business, it should normally not make a profit, but should be expected rather to reduce its charges if a profit would otherwise result. The fact that a government is engaged in such an enterprise means, or should mean, that the enterprise itself is so important that it can not be left in private hands. If an enterprise is of such importance, certainly the government should not maintain charges sufficient to produce a profit.

Relationship between expenditure and revenue

In private finance the amount of expenditures is limited by the amount of revenue. In state and local finance it is to a great degree true that the amount to be expended is first determined upon, and that plans are then

made to raise revenues sufficient to meet the proposed expenditures. State constitutions to some extent limit the rates of both state and local taxation; and laws in a number of states limit the tax rates of local areas of government. The statutory limitations upon local tax rates are constantly being shifted upward. Although some constitutional and legal limitations exist, it is nevertheless largely true that government bases its expenditures not upon directly available revenue, but rather upon its needs. Because of this fact, there are no such pecuniary limits upon public finance as upon private finance; although there is always a check upon governmental expenditures, due to the feeling that popular disapproval will arise if taxes become too heavy.

Need for standards

Private business fails if it is unsuccessful. If a government fails in its operations or is inefficient, the normal result is increased taxation or increased public debt. The operations of government can not, therefore, be tested by the standards of business success. However, in the operation of government it is necessary that standards be set up by which to test success or failure. The chief penalty for governmental failure is popular disapproval at elections when taxes become too heavy. But this penalty is imposed only after the damage is done.

Establishment of standards

Little has yet been done in this country toward establishing standards by which the success of governmental operations may be determined. Standards as to supplies to be purchased for governmental use have in some cases been set up, as have also standards regarding uniformity of pay of state employees rendering services of the same character. Something has been done in the state operation of charitable and penal institutions, under coördinated management, to compare the cost of operation of institutions of the same classes. But the *per capita* cost of charitable and penal institutions is not an adequate standard for the measurement of governmental economy and success in operation. It is possible to set up, to a

CHAP. XVI

much greater extent, objective standards by which to determine the success and economy with which governments perform their functions.

Standards in private enterprises of government

Where governments have undertaken to perform functions of the same type as those performed by private business, something of a test of governmental success in operation exists through the comparison of private and public operation. However, even here state and local governments have frequently not kept their books in such a manner that there can be an effective comparison of the result of public and private operation. Even where this has been done, certain allowances must be made for differences that exist between public and private operation.

Payment for government services

The purpose of government is not to accumulate a surplus or to make a profit, but to perform services for its citizens. Many of these services must be paid for by general taxation; some are paid for in whole by those to whom the services are rendered; and some are partly paid for by those to whom the service is rendered, and partly from general taxation. As government functions expand and as conditions change in the several states, there comes a shifting in the manner by which the government obtains payment for the services it renders.

Government expenditures

There has been a steady increase in the number of things done by state government, and necessarily a proportionate increase in the revenue required for the purpose of doing these things. The table given below indicates total state expenses for governmental functions for the years 1915 to 1919, and also the *per capita* cost of such functions for each of these years:

NET GOVERNMENTAL COST PAYMENTS

		Per Capita
1915	490,707,827	4.99
1916	505,399,448	5.05
1917	513,063,487	5.04
1918	561,000,035	5.42
1919	635,370,153	6.05

Increased expenditures

The cost of state government has enormously increased in the past thirty years. To take a specific state as an example, the total appropriations for state governmental purpose in Illinois for the two years 1877-79 were $6,562,653; the total appropriations for the two-year period 1917-19 were $50,649,470. Virtually every other state has a similarly comparable increase in expenditures, and this increase has been continuous up to the present time. The United States Bureau of the Census has for several years issued an annual publication entitled *Financial Statistics of States.* The latest available issue of this publication is that for 1919. This census report analyzes in detail all governmental cost payments for expenses of the general departments of the state government. This does not include all payments for governmental expenses, but does give a somewhat satisfactory analysis of the chief purposes for which the states expend money. The table from this census report presented below indicates the distribution of governmental cost payments for the expenses of general departments in 1919, and also gives the percentage of such total cost for each of these purposes:

GOVERNMENTAL COST PAYMENTS FOR EXPENSES OF GENERAL DEPARTMENTS, 1919

		Per cent.
General government	$ 52,151,603	9.6
Protection of persons and property	34,102,524	6.3
Development and conservation of natural resources	24,359,455	4.5
Conservation of health and sanitation	14,403,578	2.7
Highways (not including new construction)	61,628,466	11.4
Charities, hospitals, and corrections (not including new construction)	134,056,498	24.7
Education	184,492,850	34.0
Recreation	1,211,967	0.2
General	36,254,200	6.7
Total	$542,661,141	

Character of expense

The proportions indicated by this table represent the situation fairly well throughout the various states. Edu-

cation constitutes the largest single item of expense of both state and local government. The charitable and correctional institutions constitute the next highest item. This latter expense is for services that one hundred years ago were primarily performed by the local communities. The state has, however, taken under its immediate direction the care of dependents who need specialized treatment, such as the insane. State governments have also taken over from local communities the detention or imprisonment of persons convicted of serious crimes. State highway expense is constantly increasing. A large part of the state expenditure for highway purposes is in the form of subsidies to local communities for the construction of roads under some degree of state supervision. Much the larger part of the money expended by the states for educational purposes is also expended through the local communities of the state. State subsidies are employed as a means of obtaining a more efficient and a more uniform school system throughout all parts of the state. A more detailed table indicating the functions performed by state governments and the relative cost of such functions is given below, analyzing in detail each of the large items presented in the preceding table:

GOVERNMENTAL COST PAYMENTS FOR EXPENSES OF GENERAL DEPARTMENTS

General Government	
Legislative Branch	
Legislature	$ 6,196,259
Legislative investigations	196,178
Executive Branch	
Chief executive	1,143,907
Secretary of state	1,352,756
Financial	
Auditor or comptroller	1,592,134
Special accounting and auditing	980,229
Treasurer	989,378
Assessment and levy of revenue	4,380,171
Collection of revenue	7,793,307
Other financial	173,225
Legal	
Attorney-general	1,595,047
Other law offices and accounts	155,496

General executive	
Civil service commission	$ 369,789
Economy and efficiency commission	37,488
Board of control	532,712
Engineer	158,593
Architect	81,903
Other general executive	930,961
Judicial Branch	
Supreme court	3,527,729
Other courts	15,237,026
Elections	888,459
General government buildings	3,838,856
Total, GENERAL GOVERNMENT	$52,151,603
PROTECTION TO PERSON AND PROPERTY	
Police	$ 1,664,327
Fire marshal or commissioner	598,570
Militia and armories	7,358,129
Fish and game warden	2,396,432
Regulation of:	
Financial institutions	2,515,389
Other corporations	
Insurance companies	1,809,201
Public service corporations	3,941,493
All other	261,142
Professional occupations	
Law	36,046
Accounting	8,679
All other	43,896
Liquor traffic	373,787
Sale of feed, seed and fertilizer	1,841,144
Sale of oil and gas	734,037
Weights and measures	288,256
Labor	6,567,247
Immigration	168,819
Other activities	1,058,535
Fire warden	492,333
All other	1,945,062
Total, PROTECTION TO PERSON AND PROPERTY	$34,102,524
DEVELOPMENT AND CONSERVATION OF NATURAL RESOURCES	
Agriculture	
Supervision	$ 1,022,722
State agricultural society	2,497,234
Private associations	1,055,876
Extension service	5,143,383
Experiment stations	5,527,919
Live stock	3,758,705
Reclamation	572,190
All other	387,377
Forestry	1,566,902
Fish and game	1,928,002

Geological survey	$ 547,363
Other development and conservation	351,782
Total, DEVELOPMENT AND CONSERVATION OF NATURAL RESOURCES	$24,359,455
CONSERVATION OF HEALTH AND SANITATION	
General supervision	$ 1,887,827
Vital statistics	410,035
Prevention and treatment of communicable diseases	8,513,016
Conservation of child life	344,112
Food regulation and inspection	1,537,844
Regulation of professional occupations	705,855
Other health and sanitation	1,004,889
Total, CONSERVATION OF HEALTH AND SANITATION	$14,403,578
HIGHWAYS	
General supervision	$ 3,060,213
Roads	
Maintained by state	27,149,801
Not maintained by state	
Apportionments	24,180,975
All other	2,866,337
Other highway structures	
Bridges other than toll	345,007
Abolition of grade crossings	82,577
Waterways	2,473,615
Repair and construction for compensation	1,469,941
Total, HIGHWAYS	$61,628,466
CHARITIES, HOSPITALS AND CORRECTIONS	
General supervision	$ 914,771
Charities	
Outdoor poor relief	602,355
Poor institutions	
State	122,797
All other	138,963
Care of children	
In state institutions	1,330,681
All other	2,149,685
Care of blind, deaf and mute	
In state institutions	5,047,469
All other	1,817,995
Other charities	
In state institutions	10,066,443
All other	649,492
Hospitals	
General	
State	3,064,943
All other	3,517,359

For insane	
State	$ 53,209,977
All other	1,910,495
Corrections	
Institutions for adults	
State	39,306,845
All other	335,949
Institutions for minors	
State	9,161,362
All other	503,690
Pardon and parole boards and officers	205,227
Total, CHARITIES, HOSPITALS AND CORRECTIONS	$134,056,498
EDUCATION	
Schools	
General supervision	$ 4,476,182
State institutions	58,100,621
Apportionments	118,589,168
All other	2,034,154
Libraries	
State	1,130,054
All other	162,671
Total, EDUCATION	$184,492,850
RECREATION	
Educational recreation	$ 332,364
General recreation	165,223
Parks and reservations	644,834
Monuments and monument commissions	69,546
Total, RECREATION	$ 1,211,967
GENERAL	
Pensions and gratuities	
To former state employees	$ 490,073
To special classes	
Soldiers and sailors	
In state institutions	5,574,970
Other relief	11,530,057
Mothers	689,695
All other	2,146,989
Incidental operating accounts	
Printing and stationery	1,859,837
All other	934,069
Gain and loss accounts	
Judgments and losses	32,946
All other	12,318
Administration of public trust and investment funds	1,163,943
All other	11,819,303
Total, GENERAL	$ 36,254,200

CHAP. XVI

Variations in state expenditure

The tables printed and discussed above give a composite indication of state governmental expenditures, although they do not include all such expenditures. State expenditures vary from one part of the country to another. The *per capita* cost of state governmental functions for all of the states was $6.09 in 1919.[1] The cost is highest in the Pacific states, with a *per capita* of $9.72, and is lowest in the east-south-central states, with a *per capita* of $3.68. The lowest *per capita* cost for any state in 1919 was $2.41 for South Carolina, in the south Atlantic group; the highest was $19.25 in Arizona, in the Mountain group.

Difficulties of comparison

It is difficult to make comparisons because of the lack of uniformity of state accounting, and equally because of the absence of the same methods of accounting and of payments as between the different states and their subdivisions. One of the difficulties encountered by the Bureau of the Census in its preparation of state financial statistics is presented in the following quotation: "In some states taxes on the capital stock of banks and other corporations, and other revenues accruing in part or in their entirety to the benefit of counties, cities, and minor civil divisions, are collected by the state, which retains its part, if it participates in the revenue, and transmits to the civil divisions such amounts as are due them. In other states such revenues are collected and expended by the counties and cities themselves. . . . To secure comparability under the circumstances mentioned, the Bureau of the Census treats receipts and payments of states on account of the revenues of other civil divisions as non-revenue receipts and non-governmental-cost payments, even though the accounting system employed by the state has included them among revenue receipts and

[1] It should be noted that the *Financial Statistics of States for 1919* gives on p. 30 $6.05 as the *per capita* net governmental-cost payments; while the same volume on p. 62 gives $6.09 as the *per capita* governmental-cost payments for all purposes.

payments for expenses."[1] Even though the Bureau of the Census has made a diligent effort to obtain comparable and accurate statistics, the test of these statistics by known facts with regard to any one state makes it clear that such statistics may not be relied upon in detail, although they may properly be employed for purposes of general comparison.

Relation between state and local expenditure

The direct state expenditures for governmental operations vary, not merely with the number of functions which a particular state performs, but also with differences in the distribution of governmental expenses between the state and its local areas. For instance, in New England the states bear expenses for certain functions whose expense is borne by counties in other parts of the country. On the other hand, although the educational systems of the New England states are among the best in the country, the state governments of New England expend directly for school purposes a much smaller proportion of their total than do the states in any other section of the country.

Expenditures of local governments

There is no possible means of analyzing all expenditures incurred on behalf of state functions by local agencies of the state. From the expenditure side there is no clear distinction between state and local functions. The expenses involved in the administration of justice and in the conduct of elections are largely borne locally, as is the case in most of the states also with the larger portion of the expenses for the assessment and collection of taxes, both state and local. The expense for protection of person and property is primarily local, although there has been in recent years a rapid development of state police. The state police, however, has in no case been instituted as a means of relieving local communities from expenditures for police purposes, but rather as a supplementary means of more effective law enforcement. Education, charities, and highways are the most impor-

[1] *Financial Statistics of States*, 1919, p. 12.

CHAP. XVI

tant items of expense from the point of view of the state; yet state expenditure in these fields is slight as compared with that of the local governments. The total expenditures of local governments are much greater than those of state government. The combined expenditures of all cities of more than 30,000 inhabitants were in 1919 nearly twice as great as the expenditures of all of the states.

National and state subsidies

State and local functions are so interwoven as not to be separable. The same situation is developing as between the national government and the states. The national government is to a large and increasing degree controlling state actions through subsidies. State governments have to a larger and larger extent, within recent years, exercised a more effective control over their local agencies through subsidies to such agencies. The states, through bearing a part of the expenses of education and of road construction and maintenance, use appropriations as a means of control over local activities. In many fields the expense of state government is primarily for supervision over local administration.

Need for plan as to relationship

Little consideration has yet been given to the whole problem of state and local relationships in the matter of expenditure, or to the conditions under which local areas should receive funds from the state government. Fairly adequate plans have been worked out in some states, and as to some matters, such as roads and schools. But the development of state and local relationships within the field of government expenditure has been largely haphazard. In the development of policy as to the relationships between state and local revenues and expenses, it is, of course, desirable also that the states work out uniform plans of accounting, so that the results in one state may be comparable with those in another.

STATE REVENUES

Types of revenue

The revenue receipts of the forty-eight states in 1919 are classified by the Bureau of the Census [1] as follows:

		Per cent.
From taxes		
General property	$237,234,778	35.1
Special property	104,222,552	15.5
Other special taxes	13,554,063	2.0
Poll	2,114,708	0.3
Business	122,667,336	19.4
Non-business license	48,025,730	5.9
From special assessments and from special charges for outlays	4,408,216	0.7
From fines, forfeits, and escheats	2,873,400	0.4
From subventions and grants	11,709,458	1.7
From donations	3,434,935	0.5
From pension assessments	1,949,256	0.28
From earnings of general departments	83,203,459	12.3
From highway privileges	68,452	0.001
From rents	7,643,943	1.1
From interest	28,800,769	4.2
From earnings of public service enterprises	3,306,147	0.5
	$675,217,202	

Analysis of sources of revenue

The general property tax is the most important single source of state revenue. The most important items included by the United States Bureau of the Census under special property taxes are inheritance taxes and taxes on the stock of corporations. These two items make up more than four fifths of the total revenue received from special property taxes. Of the income received from business taxes, the most important items are those collected from insurance companies and from other incorporated companies. The sources of revenue classified by the Bureau of the Census as special property taxes and business taxes are naturally employed to a greater extent in the larger industrial states; and in these states they produce a large proportion of the revenue. Of receipts from non-business licenses, the most important

[1] *Financial Statistics of States*, p. 60. See M. L. Faust in *Annals of the American Academy of Political and Social Science*, XCV, 113 (May, 1921).

CHAP. XVI

item is that of motor-vehicle licenses, which produces about 90 per cent. of the revenue received from this source. Licenses of motor-vehicles are now employed in almost all of the states as a means of raising revenue for the construction and maintenance of roads.

Analysis continued

The item of subventions and grants is made up of subsidies granted by the national government to the states. Such subsidies are granted under rather definite conditions, one of which usually is that the states shall also expend an equal amount of money. There has been a rapid growth of such subsidies from the national government to the states. The total state receipts from such source is now much greater than in 1919. During its fiscal year July 1, 1920, to June 30, 1921, the state of Illinois received from the United States government total payments of $5,041,642.51 for vocational education, social hygiene, highways, and certain other purposes. This sum constituted nearly 11 per cent. of the total cash receipts of the state during that year.

Earnings of general departments

The item "Earnings of general departments" requires some explanation. Most of the items classified under this heading by the United States Bureau of the Census are not really earnings in the sense that a private individual or corporation has earnings. They are to a large extent fees payable into the state treasury for special types of state services. Such fees are usually not based in any precise manner upon the cost of the service, and are really to a large extent governmental sources of revenue in the same manner as are receipts from taxation. Many offices of state government collect more in fees than they actually cost, and therefore claim that they are of no expense to the state. They overlook the fact that the fees they receive are for governmental services; the claim that they are self-supporting may be destroyed by a legislative provision that all fees shall be paid to a single central office. The state is quite as much interested in the services it renders in return for fees as

in any of its other functions. Certain items classed as earnings are more distinctly comparable with earnings from private industry. There is a large item of receipts from state educational institutions. Virtually all of the states have colleges or universities and normal schools (and some have other types of institutions) in which fees or tuition are charged. These charges are somewhat comparable with similar charges by educational institutions not operated by state governments. However, no institutions of higher education charge fees or dues sufficient to pay the expenses of the institutions themselves. This statement applies even to a greater extent to state educational institutions than to non-public institutions. State governments also receive fairly large sums for the care of insane and other inmates of state institutions, in cases where charges for this purpose may be made to those upon whom the inmates are properly dependent. Correctional institutions in virtually all of the states operate industrial enterprises and derive revenue by selling the products that they manufacture to other departments or institutions of the state government or to local governments. All of these receipts are credited by census statistics to earnings of general departments. However, it is clear that an industrial enterprise operated in connection with a prison or a reformatory is not directly comparable with an industrial enterprise operated through the use of private capital and of free labor.

General property tax

The general property tax, as used in a number of the states, is based upon the theory that all property should be treated alike for the purpose of bearing the cost of government, and that all property can be equally assessed for the purpose of taxation. Under a satisfactory assessment plan, it is possible to obtain valuations of real property for a whole state upon substantially the same basis. Land and buildings can be readily found and their value can be discovered if sufficient care and

CHAP. XVI

time are devoted to the task. When we come to tangible personal property—personal property that can be seen and handled—there is greater difficulty in making an equal assessment upon the basis of value. But even here equal assessment is to some degree possible with respect to such property as live stock, farm implements, and merchants' stock in trade. This statement is not so true of tangible property which is in such form that a small object has great value, as in the case of jewels. Such an object can not, of course, be so easily found by the assessor. When we come to what is termed "intangible personal property," of which stocks and bonds are the best examples, the tax assessor has a virtually impossible task; for the stocks and bonds are not in themselves valuable, but merely evidence of the owner's interest in things that are valuable.

Assessment

Under plans for a general property tax, the ordinary arrangement is that the assessor shall, at certain definite intervals, personally view and value for taxation all real property. For the valuation of both tangible and intangible personal property, resort is ordinarily had to a personal property return prepared by the owner of the property, with power in official assessors to make a valuation, supplemented by a penalty, where the owner does not make a return or makes an incorrect return. For much tangible personal property the official assessor has no way of correcting or checking the return made by the person to be taxed. If no return is made, the assessor has no basis, in most cases, for knowing whether a return should be made. With respect to intangible property the situation is still more difficult. If a tax-payer locks up his stocks and bonds in a safety-deposit box and does not tell the assessor about them, there is virtually no way by which the assessor can discover the existence or the value of this property. By no amount of legislation has it yet proved possible to force the tax-payer in such a case to tell the assessor about his property.

Stocks and bonds have here been used merely as an illustration of intangible personal property, which under the general property tax usually escapes assessment or taxation.

Defect of uniform general property tax

Under the uniform general property tax, which is still strictly required by the constitutions of at least eight states, and to a large extent provided for by statute in a number of other states, all property is treated as if it were alike, while it is actually not so. Under the complex industrial organization of to-day there are numerous types of property. The assumption that all property is alike may have been, and to a large extent was, true when the states were primarily rural in character. While distinctly untrue as to all of the industrial states, it is now to some extent untrue also of all of the states.

Constitutional provisions

Because of the fact that the general property tax as a single source of revenue no longer fits economic conditions of the American states, there has been a definite tendency away from constitutional provisions requiring such a tax.[1] In Arkansas, New Hampshire, South Carolina, Tennessee, Texas, Washington, and West Virginia, constitutional provisions are strict with respect to the use of a uniform general property tax; in certain other states, such as Illinois, special types of taxes are authorized; but otherwise a uniform general property tax is required. In Ohio the requirement as to a uniform general property tax is stricter than in Illinois. Some states have little or no constitutional provision regarding taxation. The New York constitution belongs in this class. Some constitutions contain brief and liberal provisions authorizing classification of property for taxation. Pennsylvania belongs in this group. In other states, such as

[1] The New York *Index-Digest of State Constitutions* gives complete details as to state constitutional provisions. *Constitutional Convention Bulletin* No. 4, on "State and Local Finance," issued by the Illinois Legislative Reference Bureau, sums up in detail the present constitutional provisions, and gives an analysis of tax systems in a number of states. A summary of the present constitutional situation in the forty-eight states will be found on pp. 250 and 251 of this bulletin.

CHAP. XVI

Kentucky, Maryland, and South Dakota, more detailed provisions regarding classification are found. In Wisconsin, Massachusetts, and several other states, specific constitutional provision has been made for an income tax.

Extent to which general property tax is desirable

Although constitutional development in this country has been directly and steadily away from the requirement of a uniform general property tax, a property tax, in one form or another, still constitutes the chief source of state and local revenue. The term "general property tax" is now used to designate that portion of the tax system based directly upon the valuation of property, and will be so employed in this discussion. Such a tax falls chiefly upon real property and upon some of the more obvious forms of personalty. The general property tax is employed in all states, either for state or local purposes; in almost all of the states it is the chief source of revenue, and is likely to remain as a permanent part of governmental methods for raising money.

Organization for assessment of property

The general property tax is a source of both state and local revenue. Inasmuch as it affects the same property and the same individuals, it is natural that both state and local governments should employ the same machinery for assessing property and collecting the tax. The assessing machinery is composed of locally chosen assessors, and state governments have properly established a large degree of supervision over this machinery, although they have at the same time left local control over the choice of those who do the assessing. In the assessment of property for taxation the state government has a double interest. It has a direct interest, because the state itself uses the assessment as a basis for state taxation; and it also has an equal though less direct interest in obtaining a fair basis for local taxation. Whether or not a state uses a general property tax, it owes a duty to its subdivisions that they, in using such a tax, shall base it upon just and equitable assessments.

The state therefore has a definite obligation with reference to the assessment of property as a basis for a general property tax; and the states have set up machinery for the supervision of such assessments.

Difficulties of state supervision

State supervision over the assessment of property is more difficult if the number of local assessing authorities is numerous. In Illinois, outside of Chicago and of seventeen small counties, local assessments are made by township assessors, with virtually little supervision upon the part of county officers. There is an equalization by a county board of review, and a further equalization by a state tax commission. However, the fact that local assessments are made in small areas by nearly 1,500 independent officers, virtually without supervision, makes the assessment machinery unjust and ineffective for both state and local purposes; for inequalities introduced in the original assessment can never be thoroughly corrected by reviewing bodies. It is for this reason that states tend to make the county rather than the township the area for the assessment of property.

Locally chosen assessors

From the point of view of state supervision over the local assessment of property for taxation, the states vary greatly. Ohio and Montana provided in 1913 for the state appointment of the persons who were to make local assessments; but both states abandoned this plan in 1915. "There is everywhere in the United States a natural and logical preference for local autonomy, and a varying degree of prejudice against excessive centralization of administrative authority. The state tax commission has had to recognize these antipathies and often to secure its results in the face of considerable local opposition. Because of the nature and history of our institutions, a complete centralization of the assessment process would doubtless be unwise; and it would certainly be unnecessary so long as a proper degree of supervisory control can be assured and a sufficient opportunity is afforded to the tax commission for leading and

CHAP. XVI

guiding the local assessors in determining the original assessment.[1]

Methods of state supervision

In a number of states a substantially effective supervisory control has been authorized by law over the work of local assessors. In Maryland provision has been made for a county supervisor of assessors, who is appointed by the state tax commission from a list of five persons submitted by the county commissioners of each county. In New Jersey assessors may be removed by the supreme court after a hearing, on complaint of the state board of taxes and assessments.[2] The Indiana law authorizes the removal of local assessors from office by the state board of tax commissioners "for incompetency, neglect of duty or misconduct in office, after five days' notice, and a hearing by such board."[3] A similar power to remove local assessors exists in Kansas. Wisconsin has established one of the most satisfactory income tax systems in the country. Under it, the income tax assessors, who are completely subject to the control of the state tax commission, also have supervision over local assessments.

State tax commissions

In more than forty of the states, state tax commissions, consisting in a few cases of a single commissioner but in most cases of three members, have been established with large powers of supervision over local assessors. In many of the states, as for example in Wisconsin and Minnesota, such commissions have power to order local reassessments, and in some cases power to make reassessments replacing those conducted by locally chosen officers. In some states legal power to order reassessments and to control local assessors has not been capable of effective exercise. In Ohio, for example, the state commission has broad legal powers, but has not been permitted to exercise even its power to compel a general reassessment of property in all of the counties

[1] H. L. Lutz in *Annals of the American Academy of Political and Social Science*, XCV, 279 (May, 1921).
[2] *New Jersey Laws*, 1921, p. 800.
[3] *Indiana Acts*, 1921, Chap. 322, Sec. 7.

of the state at regular and frequent intervals. State tax commissions usually have wide powers of equalization and review, and such powers have been effectively exercised in Kansas, Michigan, and Minnesota. Reassessments undertaken in Wisconsin and Minnesota have also been effective means of bettering the basis of general property taxation.[1]

Administration of state taxes

While the states still rely to a large extent upon general property taxes, there has been a steady development toward the use of other types of taxation. For certain forms of taxation it is virtually necessary for the state itself to set up the administrative machinery. This is true of corporation taxes, and also of income and inheritance taxes. Most of the states have also found it necessary to set up state machinery for the assessment of railroad and public-utility property. As a matter of fact, the greatest authority exercised by state tax commissions often has to do with the assessment of property that can not readily and effectively be assessed locally. Special types of insurance taxes are also of necessity administered by central state authority; and the same statement applies to a large extent to the administration of motor-vehicle license taxes, which have been imposed in virtually all of the states. The central state machinery for purposes of taxation thus has a dual function. It supervises the local assessment of property as the basis for both state and local taxation. It makes certain assessments itself, and also supervises the operation of certain types of special taxation that can not readily be left to local administration.

Income tax

State income taxation is now becoming popular.[2] The administration of such a tax is rendered easier by the existence of a federal income tax, although the successful

[1] See H. L. Lutz, *State Tax Commissions* (Boston, 1918, Harvard Economic Studies, Vol. XVII); also article by Professor Lutz referred to above.

[2] Alzada Comstock, *State Taxation of Personal Incomes* (Columbia University Studies in History, Economics, and Public Law, Vol. CI, No. 1, 1921).

CHAP. XVI

use of the state income tax by the state of Wisconsin came before the establishment of the federal income tax. Income taxation must almost necessarily be managed by the state itself. In establishing income taxes some states have definitely provided that a portion of the receipts from such taxes shall be distributed back to the local communities. This is the arrangement, for example, in Wisconsin and Massachusetts. It is probable that income taxation will in a few years replace the direct taxation of tangible and intangible personal property upon the basis of value.

Separa of state and local taxation

Some years ago there was a tendency toward a separation of state and local sources of revenue.[1] This tendency no longer exists, although the constitution of California expressly requires such a separation.[2] Without such constitutional provisions, the states of Pennsylvania and Delaware made no use of general property taxes as a source of state revenue in 1919. The present attitude with respect to separation of state and local sources of revenue is well summed up in the report of the Committee of the National Tax Association upon a Model System of State and Local Taxation: "Total separation of the sources of state and local revenue, at least in the forms in which it is usually presented, seems to the committee to be distinctly a backward step, especially at this moment when the need is for greater emphasis upon state control over the taxation of property for local purposes. A further difficulty of complete separation is that the abolition of the direct state tax upon property tends to remove a desirable check upon state expenditures."[3] It is desirable that there be some separation of the sources of state and local revenue. Certain types of taxation are not capable of effective local administra-

[1] Mabel Newcomer, *Separation of State and Local Revenues in the United States* (Columbia University Studies, Vol. LXXVI, No. 2, 1917).

[2] California constitution, Article XIII, Sec. 14.

[3] *Preliminary Report* of the committee appointed by the National Tax Association to prepare a plan of a model system of state and local taxation, p. 43.

tion, and it is proper that certain of these should constitute sources of state revenue alone. The inheritance tax is of this character. In establishing income taxation, there will in all likelihood be a definite tendency to follow the lead of Massachusetts and Wisconsin, and to exempt personal property or intangible personalty from taxation as property. This substitution of a state-administered income tax for personal property taxes, from which both the state and its local areas have heretofore derived a revenue, will, of course, deprive local communities of an existing source of revenue; and it will probably be desirable to return some of the receipts from income taxation to the local communities, as is done in Massachusetts and Wisconsin.

State and local tax rates

Even though a state should not use the general property tax as a source of revenue for itself, it is undesirable that it should wash its hands completely of the assessment of property for local purposes. States are more apt to establish and continue effective machinery for the supervision of local assessments if they themselves derive some revenue from taxation based upon the same assessment. A continued use of the general property tax by the state is also desirable for political reasons. At the present time the success or failure of a governor is to some extent judged by the tax rate, though such rates are capable of a good deal of juggling for political purposes. The state tax rate usually forms only a small part of the total property tax rate in any community. There are, in most cases, a number of overlapping areas of local government, each with an independent tax rate, and local tax rates make up the bulk of the amount to be paid by the tax-payer. As an example of the way in which the property tax rate may be made up, the following illustration is given of the items that went to make up the tax rate within the town of West Chicago in the city of Chicago for 1920:

CHAP. XVI

State	$ .40
Cook County	.52
Forest Preserve District	.06
City of Chicago	2.29
Board of Education	1.62
Sanitary District	.17
West Park Board	.51
Total	$5.57

Model tax system

Under the model system of state and local taxation suggested by the committee of the National Tax Association, income taxation plays a large part. Under this plan it is proposed to have personal and business income taxes. It is also recommended that there be a tax upon tangible property. The committee strongly favors the exemption of intangible property of all descriptions from taxation as property, relying upon personal and business income taxation as a means of reaching such property through other channels. Aside from inheritance taxation and some other special forms of taxes, such as the licensing of motor-vehicles, revenue under this proposal would be raised by taxation upon personal and business incomes, and by the taxation of tangible property upon the basis of valuation.

Difficulties of constitutional change

There has been a steady tendency toward detailed constitutional provisions with reference to taxation. Detailed provisions requiring a uniform general property tax were introduced into a large number of constitutions at a time when a uniform property tax was ceasing to be desirable, and these provisions have placed great obstacles in the path of desirable readjustments. A number of constitutions prescribe the assessing machinery and the manner in which property shall be sold for the non-payment of taxes. Such provisions have accomplished no good and have done much harm. A legislative body, meeting at frequent intervals, should have power to deal with the new problems of taxation as they arise.

"Honest graft"

In the operation of government there should be no effort to accumulate a surplus in the state treasury. However, a complete adjustment can not be made between revenues and probable expenses over a given period of time, and tax money normally comes in at one period of the year, while expenditures must be made continuously throughout the whole year. Because of these facts, money often accumulates in the state treasury and in the treasuries of local government areas. It is bad business policy to leave such money lying idle in the vaults of the state and of its local governing bodies. In a few states the plan may still be employed of keeping all state money in the vaults of the state. Normally, however, money in the hands of the state or of its local communities is deposited in banks, or is placed in some safe form of temporary investment, so that it may be readily obtained when needed. It is perhaps a general principle of the law that interest upon public money belongs also to the public. But, unless there is some control over public officers having the custody of money, interest received upon such money, or a portion of such interest, is likely to find its way into the pockets of the officers, rather than into the public treasury. Certain offices involving the custody of public money have been worth in a year many times the official salaries that were paid. To a large extent the pocketing of all or a portion of the interest upon public money has been regarded as "honest graft."

State deposit laws

In a number of states laws have been passed specifying in detail the manner in which banks shall be chosen as depositaries for state money. The Illinois law of 1919 is one of the latest pieces of legislation of this character, though its principles are largely borrowed from other states.[1] Through legislation safeguarding the de-

[1] See *Illinois Laws*, 1919, p. 954.

CHAP. XVI

posit of public money, and requiring public bids by banks which desire such deposits, much has been accomplished toward obtaining the interest upon such money for the state treasury; and serious political abuses have at the same time been avoided or ended. In many states legislation has also been enacted with respect to the payment of interest on deposits of local government areas within the state. Perhaps the most satisfactory laws regarding the deposit of state money are those of Indiana, Kansas, Minnesota, Missouri, Ohio, Wisconsin, and Illinois.

THE BUDGET

State financial machinery

State constitutions establish the financial machinery of the states in broad outline. In this machinery the state legislature enacts laws for the raising of revenue and makes appropriations. Appropriations are made for the expenses of three departments of government; but the executive functions are much the more expensive, because the agencies of the executive department perform the bulk of activities undertaken directly by state governments. Legislative and judicial expenses are negligible as compared with those of the different agencies constituting the state executive department. Each state has a treasurer, and also a state auditor or comptroller. The function of the auditor or comptroller is chiefly that of seeing that no more money is paid out than has been appropriated; and the chief function of the state treasurer is to keep safely the money of the state, and to pay out such money upon proper orders approved by the auditor or comptroller.

Absence of financial system

Until about fifteen years ago, none of the states had a real financial policy. The constitutions of many states fix a definite period for appropriations (usually two years), but in other states continuing appropriations may be made. In some states certain sources of revenue are set aside for particular purposes without periodical

appropriation. In the states where all appropriations must be made for certain definite periods, and no money may be expended from appropriations after the expiration of such periods, a basis exists for a state financial policy, subject to complete control at periodical intervals by the state legislature. Until recent years no states have had systems by which the financial needs of all departments and offices of the state government were presented in a clear and intelligent manner to the state legislature. Each individual office of the state executive department, and the other departments as well, sought to obtain what they could of financial support from the legislature. The legislature had no accurate, complete, or single statement of needs, and its consideration of proposed appropriations was ineffective. The growing power of the governor to veto items of appropriation was relied upon to meet this situation.[1]

Movement for state budget

As state expenditures increased, the absence of a state financial policy became more apparent. The New York Bureau of Municipal Research took the lead in bringing the need of better financial methods to the attention of the states, and great credit for arousing public interest in this matter is due to Dr. Frederick A. Cleveland, who was the director of that bureau.[2]

Progress of movement

So-called "budgetary legislation" now exists in all but two or three of the states. Most of the states have adopted what is termed an "executive budget." That is, they have placed the preparation of the budget primarily under the control of the governor. Several states have

[1] For a review of state financial plans see S. Gale Lowrie, *The Budget* (Wisconsin State Board of Public Affairs, Madison, 1912). See also E. E. Agger, *The Budget in the American Commonwealths* (Columbia University Studies, Vol. XXV).

[2] For a review of state budgetary legislation see Cleveland and Buck, *The Budget and Responsible Government* (New York, 1920). The information in this volume is brought up to date by Dr. Buck's article in *National Municipal Review*, X, 568 (November, 1921); and a note in the *American Political Science Review*, XVI, 73-78 (1922). See also W. F. Willoughby, *Movement for Budgetary Reform in the States* (New York, 1918), which summarizes the experiences of the states, but is somewhat too credulous in accepting claims of results in some states.

CHAP. XVI

confided the preparation of the budget to legislative committees. Some have budget boards or committees composed of both executive and legislative officers; and other states leave the preparation of the budget in the hands of an administrative board. The details of organization in the several states vary greatly.

Constitutional amendments

Four states have adopted constitutional provisions with respect to the state budget. The Maryland budget amendment of 1916 is the first detailed provision upon this subject to be adopted by constitutional change. This amendment provides that the governor shall submit to the General Assembly two budgets, one for each of the ensuing fiscal years, and that each budget shall contain a complete plan of proposed expenditures and estimated revenues for the fiscal year to which it relates. Each budget is required to be divided into two parts, one dealing with governmental appropriations for the ordinary conduct of the state government, and the other including all other estimates of appropriations. The General Assembly is permitted to amend the bill by increasing or decreasing the items relating to the General Assembly and by increasing items relating to the judiciary, but otherwise may not alter the bill, except to strike out or reduce items. The bill when passed becomes law immediately, without further action by the governor. Supplementary appropriation bills may be considered in either house after the budget bill has been finally acted upon; but every supplementary appropriation must be embodied in a separate bill limited to some single work, object, or purpose, and each supplementary appropriation bill must provide the revenue necessary to pay the appropriation so made. Each supplementary appropriation bill is subject to the veto power, both as a whole and as to items. In connection with the budget bill, the governor, or any other executive officer designated by the governor, may appear before either house; and such officer may be required by either house to appear. The Maryland

budget amendment was largely copied from a provision contained in the proposed constitution rejected by the people of New York in 1915.

Massachusetts

The Massachusetts amendment adopted in 1918 places upon the governor the full responsibility for the preparation of the budget estimates to be submitted to the general court. The governor's budget includes all proposed expenditures for the fiscal year, and is presented in the form of a general appropriation bill. The general court is authorized to increase, decrease, add, or omit items in the budget. After action upon the governor's budget, special appropriation bills may be enacted, each bill providing the specific means for defraying the appropriations therein contained. The governor is authorized to disapprove or reduce items or parts of items in any bill appropriating money. Under the Maryland plan the legislature may not increase the governor's budget, but the budget becomes effective upon final legislative action, without approval by the governor. In Massachusetts the general court may increase items or add items, but the governor is authorized to disapprove or reduce items or parts of items, either in the governor's budget bill or in any other appropriation bills. Both the Maryland and the Massachusetts plans accomplish much the same purpose, the one by making the governor's budget recommendation final, and the other by giving the governor an enlarged veto power after the legislature has acted.

Nebraska

The Nebraska budget plan, adopted by constitutional amendment in 1920, differs somewhat from the plans of Maryland and Massachusetts. The governor presents itemized estimates for the ensuing two years. "No appropriation shall be made in excess of the recommendation contained in such budget, unless by three-fifths vote of each house of the legislature, and such excess so approved by a three-fifths vote shall not be subject to veto by the governor." In all other cases the governor has power to veto items of appropriation.

CHAP. XVI

West Virginia

A budget amendment adopted by West Virginia in 1918 is similar to the Maryland amendment, except in the very important respect that in West Virginia the estimates are prepared and submitted by a board consisting of the governor, secretary of state, auditor, treasurer, attorney-general, superintendent of free schools, and commissioner of agriculture. In West Virginia, instead of having a single executive officer responsible for submitting the budget, this responsibility is placed in the hands of a board of the more important state executive officers. Such a plan gives each such officer substantially as much power as the governor in recommending appropriations, and actually reduces the governor's authority.

Elements of a state budget

Consolidated estimates alone do not make a state budget. A budget is a financial picture of the government for which it is made, and the picture can not readily be retouched so as to look better than the government that constitutes the original. There can be no centralized budget control unless there is a definite administrative control and responsibility. The budget is not merely an estimate of proposed appropriations, or such an estimate plus proposed means of raising revenue. It is a financial plan for the operation of government during the state's fiscal period. The administration of the budget, year in and year out, is quite as important as its proposal and legislative enactment. Permanent financial control is an essential element in a successful budget. The following elements must be united in order to establish an effective budgetary plan:

(1) The presentation of a unified plan of proposed state expenditures for the fiscal period, together with proposals as to revenues necessary to meet these expenditures. As the executive is the chief spending authority, such a unified plan of proposed expenditures must necessarily come from the head of that department if there is a unified executive. Expenditures of the legislative and judicial departments are relatively small, and

estimates of their needs may readily be handled by these departments without materially interfering with the unity of the budgetary proposal. So long, however, as the state executive is composed of a group of elective officers, each such officer will be substantially independent. No matter how much statutory authority is given the governor to revise the estimates of other elective state officers, each such officer will in fact determine to a large extent what his own estimates will be. The governor can not antagonize other elective state officers by declining to accept their estimates, even though he has authority to do so.

(2) The legislature must organize to consider the budgetary proposal as a unit, with full information as to the reason why appropriations are asked. In order that the legislative department may preserve its control over appropriations, the legislature should act upon the whole budgetary policy of the state at regular intervals; and all appropriations should lapse within a definite period, preferably two years. In order to enforce the governor's responsibility for the budgetary proposal, and for expenditures by his own department, the legislature must look to the governor alone for advice with respect to the financial policy of the executive department. This is out of the question unless the governor so controls his administrative organization that there is no lobbying behind his back in order to obtain greater appropriations than those to which he has consented in the submission of his budgetary program.

(3) There must be a continuous supervision of the execution of the budget, once it is enacted; and this supervision is best vested in the hands of the governor. Without a supervision over the administration of the budget during the whole period to which it applies, the governor in making recommendations can not have full knowledge of the state's needs. A continuous administration is also essential in order that deficits may be

avoided. The legislative department is not organized to administer a continuous financial control, and such control is a part of the executive function, for it involves the executive enforcement of the financial policy authorized by the legislature. The appropriation policy adopted by the legislature means little if each office may exceed the amount it is authorized to spend. Uniform accounts in all offices and departments of the state government form a necessary basis for the exercise of continuous financial control.[1] A standard and permanent classification of appropriation items is essential to a system of uniform state accounts, for appropriations must be expended and accounted for in the terms in which they are made by the legislature. Continuous financial control in the hands of the governor is the most effective means of giving him command of the whole state administration. Under the civil administrative code in Illinois, the governor has complete financial control over the nine departments whose directors he appoints.[2] In only a few states has there been established in the hands of the governor, or under his control, a complete supervision of the enforcement of the state budget. This has been accomplished in Nebraska by legislation providing that no appropriation shall become available for use, except after the submission of quarterly estimates and their approval by the governor.[3] Similar powers exist in Ohio under the administrative code enacted in 1921. But, no matter what legal authority is given to the governor to control financial policy, his actual control is for political reasons small with respect to other elective state officers.

(4) To each session of the legislature should be presented a careful report of the results of the budgetary administration during the preceding fiscal period. The

[1] For an indication of the status of uniform accounts, see Mathews, *Principles of American State Administration*, p. 281.

[2] The Illinois department of finance has issued a series of bulletins outlining the manner in which this financial control is exercised.

[3] Nebraska Laws, 1919-1921, p. 745.

legislative department should have complete authority to investigate the administration of the financial policy authorized at its previous session, and reports from the executive should be presented in such a form as to make such investigation easily possible. The legislative department neither needs, nor is organized to exercise, a control over all of the details of state financial policy. If it seeks to exercise such a control, it will almost certainly lose in a maze of details the control of policy that it can and should exercise.

Legislative power

The budgetary plan here outlined in no way involves a decrease in legislative authority. The theory of popular control over appropriations is that of legislative control over the general policy of the executive. Without unified executive control in presenting and administering a budget, each legislative session is faced with a lobby seeking increases in appropriations for specific offices, or specific increases in salary for particular employees. This situation still exists in many states to such an extent that legislative control over general policy is lost. By forcing the executive department to present, and to stand as a unit for, the financial program as to that department, the legislature will be able to regain control over the state's appropriation policy.

Unified executive necessary

In most of the states the so-called budget is merely a consolidation of estimates, without control by the governor over what the different branches of the executive department shall ask for or receive, and without supervision over the expenditure of appropriations after they are made. There is no effective control by the governor in any state over estimates or expenditures made by elective state officials other than the governor. A unified executive budget can not exist without a unified executive. There is little possibility of effective budget estimates and budget administration, and of effective accounting control, without a central executive responsibility.

CHAP. XVI

Continuous state policy

One of the most serious difficulties in planning an adequate state financial policy is that which results from the absence of continuous state policy. If each state administration is to disregard the policies of the past administration, and is to establish anew its financial policy without reference to the past, a budgetary plan will fail each time governors change. In a large number of the states governors serve for two-year terms only. Some method must be worked out by which the head of a new administration will be (before that administration begins) coördinated with the financial activities of the administration that is just ceasing to have authority. Not only this, but there must be a permanent expert personnel built up in the state service which shall carry on something of continuous policy. It is natural and proper that the chief state officers should change with the change of a governor, but there is little political need for a change in officers below the heads of departments. There should, so far as possible, be a permanent and technically trained staff of state employees. In order that a new state administration may carry on state policies with any degree of effectiveness, it must rely upon a professional group of technically trained employees. This does not mean that a bureaucracy should be established; but it does mean that, without a permanent governmental personnel, each governor in turn is handicapped and his efforts to carry out policy are thwarted. Such a permanent personnel should be non-political; and a tradition should be built up, as in Great Britain, that such a personnel should serve with equal fidelity the leaders of either party.

STATE DEBTS

Constitutional provisions

The early state constitutions contained no restrictions on public indebtedness. The internal improvement movement which began early in the nineteenth century

led to the incurring of heavy indebtedness by a number of states. The internal improvements undertaken by the states resulted in failure and in the imposition of heavy taxes for the payment of state debts. As a result, restrictions began to appear in state constitutions upon the incurring of state debts or upon the engaging in internal improvements. The first state constitution to contain such a provision was that of Florida in 1838. These restrictions are now found in all but a few of the state constitutions. Constitutional provisions regarding state indebtedness vary a great deal in their details.[1] As a rule they contain an authorization for the incurring of a relatively small debt to meet casual deficits or temporary emergencies. About a third of the states authorize the incurring of an indebtedness beyond the constitutional limit, by submitting the law providing for such indebtedness to a popular vote. Virtually all prohibit the loan or pledge of state credit to private enterprises, and also prohibit states from subscribing to the stock of private corporations or assuming liabilities of individuals, associations, or corporations.

Increased indebtedness

Although almost all of the state constitutions contain definite restrictions upon the incurring of state indebtedness, there has been in recent years a rather definite tendency to extend the debt-incurring powers of the states, either by constitutional changes or by popular referenda under the terms of existing constitutions. Illinois for a number of years had no bonded indebtedness, but in 1908 authorized by constitutional amendment a bond issue to the amount of $20,000,000 for the construction of a deep waterway; in 1918 by popular referendum authorized a $60,000,000 bond issue for good roads; and in 1922 will vote upon a $55,000,000 bond issue for a soldiers' bonus. Within a short period a state having no bonded indebtedness, and no authoriza-

[1] For detailed analysis of these provisions see *Illinois Constitutional Convention Bulletin* No. 4, "State and Local Finance," pp. 296-299.

CHAP. XVI

tion therefor, will thus have been authorized to incur, and will probably incur, an indebtedness of $135,000,000. The development of state highway programs is largely responsible for increasing state debts. In New York more than $118,000,000 in bonds have been issued for canals and $65,000,000 for state highways. More recently, the movement for bonuses to be paid to veterans of the World War has led to a still further extension of state indebtedness.[1]

Character of indebtedness

Under these circumstances state indebtedness has steadily increased in recent years. The table given below indicates the increase in net indebtedness between 1915 and 1919:

1915	$424,154,647
1916	459,661,269
1917	501,943,386
1918	502,493,213
1919	519,886,598

Full statements of the development since 1919 are not available, but there can be no doubt that state indebtedness has increased more rapidly during these three years than during the five-year preceding period. Of the net indebtedness of $519,886,598 in 1919, the greater amount was made up of the state debts of Massachusetts, New York, and California. Massachusetts had at that time a net debt of more than $85,000,000. Much the greater part of this debt, however, was in reality not a state indebtedness, but an indebtedness of the metropolitan district including Boston and its suburbs. The state has assumed the administration of expenditures in connection with common sewer, park, and water systems, and on account of highway and bridge improvements for this district; but the burden of paying the debt is actually upon the local territory that profits by the improvements. New York in 1919 had a net indebtedness of

[1] For an account of the movement for soldiers' bonuses, see note by Charles Kettleborough in the *American Political Science Review* for August, 1922.

nearly $175,000,000, and California had a net indebtedness of nearly $45,000,000. CHAP. XVI

LOCAL FINANCES AND THE STATE

Taxation

Attention has already been called to the close relationship between state and local revenues. In most of the states one of the chief sources of revenue is the same for both the state and its local communities; and the state exercises a direct supervision over the assessment of property as a basis for the general property tax.

Constitutional limits on tax rates

Usually state governments also exercise control over local tax rates. In some cases local tax rates are fixed by constitutional provision. Unforeseen results, however, occasionally come from constitutional limitations upon the tax rates of particular local governing bodies. In Illinois the county tax rate is definitely limited by constitutional provision. This means that the county revenues are not sufficient for certain purposes, and that other local areas must be used for administrative activities where the county would be the more effective area.

Statutory limits on tax rates

Statutory limitations upon local tax rates are common. With the increased financial needs of local governing bodies, there is a constant pressure upon state legislatures to increase rates; and this pressure naturally results in increases at various times. The pressure for increased local tax rates was particularly great during and after the World War, when the cost of rendering governmental service was much greater. In adjusting local tax rates, state legislatures ordinarily act without full knowledge of local needs, and they often act substantially without any knowledge whatever. This is a criticism not so much of the legislature as of the whole governmental system. Without a careful and continued study of local needs, a state legislative body can not at periodical intervals readjust local tax rates with any degree of intelligence.

CHAP. XVI

Local budget movement

The budget movement has reflected itself in legislation with respect to the city, county, and other types of municipal bodies. There is a board of so-called budget commissioners in the Ohio counties; and there are excise boards in Oklahoma counties, to which the local governing bodies within the counties submit their financial needs. But these institutions in Ohio and Oklahoma are not really bodies for the development of any definite financial plans within each of the local governing areas; rather they are ineffective attempts to limit expenditures of all governing bodies within the counties.

Budget legislation

Legislation specifying budget procedure for local governing areas exists in a number of the states, but here again the budget exists more in name than in fact. Legislation of Florida and Oregon is perhaps sufficiently illustrative of legislative provisions on this subject. The Florida legislature has provided that the clerk of the circuit court shall act as county auditor and shall make, each year, an estimate of receipts and expenditures. The county board is not permitted to spend more than 95 per cent. of the estimated revenues. It is unlawful to transfer money from one fund to another without the approval of the state comptroller. This officer is authorized to prescribe methods of accounting in connection with county budgets and to make rules for carrying the state legislation into effect. Oregon legislation of 1921[1] provides that each municipal corporation shall appoint a budget committee of citizens equal in number to the official body that levies the taxes. This committee is to prepare estimates, and there are to be hearings upon the proposed expenditures of each municipal corporation. In the matter of local budgetary provisions Indiana and New Mexico have gone farthest. Indiana legislation of 1921 [2] provides that tax levies may be made by the proper officers of municipal corporations after the formulation and pub-

[1] Oregon General Laws, 1921, page 228.
[2] Indiana Acts, 1921, p. 641.

lication of a budget on forms prescribed by the state board of accounts. Notice of hearings upon the budget is to be published. Tax levies are certified by the county auditor to the state board of tax commissioners. Ten or more tax-payers may petition against a tax levy or any item thereof. The state board is given authority to affirm or decrease the total levy or any item thereof, after a hearing in the county in which the municipal corporation is located. New Mexico legislation of 1921[1] requires the county commissioners of each county to submit annually to the state tax commission estimates of revenues and expenditures. The traveling auditor of the state is required to submit to the commission a statement of income and expenditures of the county for the last preceding year. The state tax commission then has power to consider these estimates, and may disapprove them in whole or in part, or may amend or change them. When approved by the state tax commission, the budget is certified to the county, and operates to limit the county's expenditures.

Local debts

Limitations upon local indebtedness came later in state constitutional history than did those upon state indebtedness. As long as the state governments engaged in internal improvements, there was no great pressure to have local communities do so. But local communities began to engage in such enterprises and to issue bonds in aid of private corporations, after prohibitions were imposed upon the states. The failure of local activities in the field of internal improvements resulted before 1850 in some constitutional prohibitions against lending municipal credit to private enterprises. A more general movement for constitutional restrictions on municipal indebtedness began about 1870. In the decade following the Civil War local communities incurred large debts for the purpose of subsidizing railroads; and in many cases the communities were forced to pay such debts without

[1] Laws of 1921, p. 408.

CHAP. XVI

deriving any direct aid from the corporations they had subsidized. All but nine states now place some restrictions on the loan of municipal credit to private enterprises. Thirty states prohibit municipalities from lending their credit to any private corporations; a number of other states impose similar though not so sweeping restrictions. Twenty-eight state constitutions place a limitation on the total debt of each municipal corporation. These limitations vary widely, although the more common limitation is that of 5 per cent. of the assessed valuation of property for purposes of taxation. Some state constitutions also require a local referendum on the issuance of bonds by municipalities, or on the making of loans beyond certain limits. About a fourth of the states fix a definite maximum period for which loans may be issued. These limitations upon the life of municipal bonds vary materially in length.

Income producing properties

In recent years there has been a definite tendency to extend the borrowing power of municipalities for waterworks, sewers, lighting plants, and other public utilities. This extension has been particularly apparent with respect to types of public utilities that may be regarded as income-producing or as largely self-supporting. Constitutional provisions in more than a third of the states now authorize loans for certain of these purposes beyond the ordinary debt limit. Of particular interest in this respect are the provisions found in New York, Michigan, Ohio, and Pennsylvania.[1]

Unforeseen result of limitations

Constitutional limitations upon municipal debt limits often lead to unforeseen results. The restrictions are ordinarily placed upon each municipal corporation; and when one municipal corporation within a given area has exhausted its debt limit, such provisions may impose no barrier against the creation of another municipality

[1] For a detailed analysis of municipal debt restrictions see *Illinois Constitutional Convention Bulletin* No. 4, "State and Local Finance," p. 299.

within virtually the same territory (but with somewhat different boundaries) and with an additional debt limit. This multiplication of local areas within the same territory, each having its independent debt limit, has been particularly common in Illinois and Washington. The supreme court of Washington has said:[1]

"But it seems to us equally plain that it was the purpose and intent of the constitution that one of these incorporations could be superimposed upon the territory of the other; that is to say, that a city or town could be superimposed upon the territory of a county, that a school district could be superimposed upon the territory of a county, a city or town, and that another municipal corporation, or perhaps more than one, could be superimposed upon the territory of a county, a city, or town, and a school district. As to the corporations specifically named, there is no question that each has its own limit of indebtedness under the constitution, notwithstanding the imposition of such indebtedness may increase the gross indebtedness attributable to the particular territory to a sum equal to each of the limitations taken separately." The court further added that the state legislature was virtually unlimited in its power to create additional corporations within the same territory. The constitutions of Nebraska and South Carolina contain provisions apparently aimed at debt limits of overlapping territories. The South Carolina constitution places an 8 per cent. limit on the debt of each municipality, and further provides that where there are two or more municipal corporations covering the same territory, "the aggregate indebtedness over and upon any territory of this state shall not exceed 15 per cent. of all taxable property in such territory."

Statutory limitations

A number of the state constitutions expressly require the legislature to restrict the borrowing power of cities and other municipalities. These commands are accom-

[1] Paine *v.* Port of Seattle, 70 Wash. 294 (1912), p. 320.

CHAP. XVI

panied in some instances by express constitutional limitations; in other cases they are laid down independently of such limitations. In substantially all of the states the limitations upon municipal indebtedness found in the constitutions are supplemented by other limitations enacted by legislative authority; and frequently the limitations imposed by legislative authority are stricter than the maximum limits fixed by constitutional provisions. In a number of cases legislation requires local referenda for the issuance of local bonds, when such referenda are not required by the constitution.

Policy as to municipal indebtedness

A few states have in recent years sought by legislation to establish a constructive policy with respect to municipal indebtedness. Wise public financing clearly requires "that no loan should be contracted to meet current expenses. One exception may be made because of the common practice by which taxes are not collected until nearly the close of the fiscal year. Accordingly temporary loans in anticipation of revenues should be permitted, but only on the condition that they be retired at an early date in the next fiscal year. It will be much more economical to advance the period of tax collections to the first part of the year and thus avoid the necessity of borrowing. New Jersey saves a lot of money by collecting her taxes in two instalments, the first falling in the middle of the fiscal year."[1] The use of municipal indebtedness should be confined ordinarily to types of improvements that are to some extent permanent in character. "That the term of the bond should be confined to the life of the improvement is elementary." Legislation in Massachusetts, New Jersey, Ohio, and North Carolina has sought to accomplish this result by prescribing the maximum terms of bonds for each of the various types of local improvements.[2]

[1] H. W. Dodds, "Better Methods of Municipal Bonding," *Annals of the American Academy of Political and Social Science*, XCV, 251 (1921).

[2] Massachusetts was the first state to devise a plan of this sort; see Massachusetts General Laws, I, 361-362 (Chap. 44, secs. 7, 8).

State administrative supervision over local debts

With respect to the control of municipal indebtedness, Indiana went farther in its legislation of 1919 [1] by providing that no municipal corporation should issue bonds or other evidences of indebtedness without the approval of the state board of tax commissioners. From the decision of the state board, local authorities were permitted, in certain cases, to petition for a submission of the question to the voters of their communities, and the action of the voters was to be final. This authority in the state tax commissioners to approve or disapprove proposals for local indebtedness was withdrawn by legislation of 1920, though an amendment of 1921 to some extent restores power to the state board.[2]

Local accounts

One of the most important developments in the field of state control over local finance has been that with respect to the supervision of local accounts. The constitution of Oklahoma contains an express provision for a uniform system of accounts, state and local, to be prescribed and audited by the authority of the state. The Oklahoma statutory provisions for this purpose, however, are unimportant. The development of state supervision over local accounts has been a statutory development, with little aid from constitutional provisions. About three fifths of the states have some state supervision over local accounts, which varies from mere reporting to an effective control. The states of Indiana, Minnesota, Massachusetts, New Jersey, New Mexico, New York, North Dakota, and Wyoming have the most effective systems; and some states publish valuable reports on municipal financial statistics. Oregon is probably the only state that has once adopted such a plan and then abandoned it. Ohio, in 1902, enacted the first important legislation in this respect, and still has perhaps the most detailed legislation and organization. Under the Ohio plan, local accounts are audited in detail by persons rep-

[1] Indiana Acts, 1919, p. 317.
[2] Acts, 1920, p. 171; 1921, p. 642.

CHAP. XVI

resenting the state bureau of inspection and supervision of public offices. There is some question whether this type of legislation is the most satisfactory means of controlling local finances. The primary responsibility for the proper conduct of local finances should be put upon the local community itself, though this is difficult until local government becomes much more simplified than it now is. It will also be wise to have a periodical audit of public accounts by persons independent of the local accounting officers. Unfortunately, no careful study has been made of the results in the various states under the different types of law providing for control over municipal accounts. A careful analysis of this legislation and of results under it should be made.[1]

Reason for state supervision

Cities, counties, and other local governing areas of the state must bear, through their locally elected officers, the direct responsibility for raising and expending money. But such local bodies can not be completely unrestricted in this respect. Constitutional limitations have not been successful as methods of restriction, and legislative limitations are ineffective if left without administrative reinforcement. Some degree of state supervision has developed in the field of local accounts and with respect to local budgets and local debts. No violation of the principle of local autonomy is involved in such supervision. The problems of local government are to a great extent problems of the state as well, and there must be some supervision by the state to see that its local agencies perform their work intelligently, economically, and honestly. But there is no possibility of effective state supervision over local finances as long as local government is composed of a group of overlapping areas, with con-

[1] Perhaps the best account of the development of state control over municipal accounts will be found in Fairlie, *Local Government in Counties, Cities, and Villages*, pp. 255-261. A further discussion of the subject will be found in Mathews, *Principles of American State Administration*, 275-278; in the *Annals of the American Academy of Political and Social Science* (May, 1913), pp. 203-209; and in Gilbertson, *The County*, pp. 120-124.

flicting powers and duties. The first step toward the development of an effective state supervision of local financial policy is the simplification of local government itself; though, until this is accomplished, existing methods should be maintained and strengthened.

NOTE TO CHAPTER XVI

Constitutional Convention Bulletin No. 4 on "State and Local Finance," issued by the Illinois Legislative Reference Bureau, presents a review of most of the subjects discussed in this chapter. Perhaps the best way to get a picture of the relative importance of the things done by a particular state is to analyze the expenditures of that state. Students in each state may readily prepare charts and diagrams illustrating the proportions in which revenue is derived from different sources and the purposes for which such revenue is expended.

Of the great mass of literature in the field of taxation, perhaps the most important to a student of state government are E. R. A. Seligman, *Essays in Taxation* (ninth edition, New York, 1921); H. L. Lutz, *State Tax Commissions* (Boston, 1918); and the publications of the National Tax Association. The method of handling deposits of public funds should be investigated in each state, though it may sometimes be dangerous to publish the results of such an investigation. In studying the budget little is gained by reading state laws alone; something must be known of their practical operation.

Upon state and local debts perhaps the best starting-point is Horace Secrist, *Economic Analysis of the Constitutional Restrictions upon Public Indebtedness in the United States.* Bulletins dealing with state and local debts were issued for the use of the Massachusetts constitutional convention. The newer state statutes regulating local indebtedness should be studied. It will be interesting to trace the amount of state indebtedness due to soldiers' bonuses.

A thorough study is needed of state supervision over local accounts. A number of states issue periodical volumes of municipal financial statistics. Of such volumes those issued by Massachusetts and New York are probably the best.

CHAPTER XVII

THE CONDUCT OF ELECTIONS

WHO MAY VOTE

Qualifications determined by states

THE qualifications for voting are determined by state constitutions and state laws, subject to the limitations of the Fourteenth, Fifteenth, and Nineteenth amendments to the constitution of the United States. The Fifteenth amendment forbids the denial or abridgment of the right to vote on account of "race, color, or previous condition of servitude." The Fourteenth amendment requires the reduction of the basis of representation of any state if the right to vote is denied to any of its male inhabitants who are citizens and twenty-one years of age; such possible reduction being "in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state." No use has ever been made of this power to reduce state representation in Congress. The Fourteenth amendment, adopted in 1868, and the Fifteenth amendment, adopted in 1870, were results of the Civil War and of the freeing of the slaves. The Nineteenth amendment provides that "the right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of sex." This amendment was ratified in 1920. Federal action has thus resulted in the extension throughout all the American states of the right to vote, in two important respects. The prohibition against discrimination upon the basis of race, color, or previous condition of servitude, and the more recent prohibition against discrimination on account of sex, constitute important landmarks

in the development of the American electorate. Within the limitations set by the national constitution, the states are free to determine what qualifications there shall be in order to vote, not only for state, but also for federal offices.

Property qualifications

Most of the states had property qualifications for voting and for office-holding at the time when they became independent of Great Britain. In its earlier stages the American Revolution was a democratic movement, and led to the lessening of certain of these restrictions. The whole tendency, indeed, during the first fifty years after the Declaration of Independence, was toward the reduction or disappearance of such qualifications. This was the natural consequence of the westward movement of population, and of the fact that ownership of real property was virtually within the reach of every citizen up until a fairly recent period of American history. In the earlier days ownership of property did not constitute a material discrimination, so far as it was a limitation based upon ownership of a specific amount of land and not primarily upon the value of the land itself. Yet, although ownership of land was within the reach of substantially all citizens under the earlier economic conditions of the United States, it was felt that basing the right to vote upon ownership of property was improper under our system of government.

Present property and tax-paying qualifications

Property qualifications still exist in a few states. In Rhode Island one must possess property to the value of $134 in order to vote at municipal elections. South Carolina requires the payment of a tax on property assessed at $300. Poll taxes still exist in some states, as, for example, in Massachusetts. In the southern states there has been during the past thirty years a development of the use of poll taxes or of certain types of tax-paying qualifications as a basis for the exercise of the suffrage. These qualifications have been parts of a general scheme for the restriction of negro voting; and, although they

CHAP. XVII

constitute to some extent a reversal of policy as it has developed throughout the history of the American states, they are explainable primarily upon the basis of the specific local situation.

Woman suffrage

The movement for woman suffrage gained great headway in the states before the adoption of the Nineteenth amendment. A large number of states had by constitutional amendment expressly extended full voting rights to women, and a still larger number had by statute given women the right to vote, either in local elections or in both local and state elections for which voting qualifications were not specified by the state constitutions themselves. It is unnecessary here to go into the development of woman suffrage before the Nineteenth amendment, for that amendment established a uniform rule for all the states.

Negro suffrage

In the southern states the question of suffrage has been somewhat more important from a constitutional and statutory point of view than in most of the other states. This situation has been due to the large negro population, which, it has been felt, should not be permitted to dominate the political situation. In Mississippi and South Carolina negroes constitute more than 50 per cent. of the total population; and in Georgia, Alabama, and Louisiana their number approaches that proportion. Great progress has been made in the education and development of this colored population, and the southern states owe an important duty with respect to its further development. However, in view of the political situation, the dominant elements of these states have felt that it is necessary to restrict negro voting, and they have accomplished this purpose by constitutional and statutory provisions. The Mississippi constitution of 1890 to a large extent set the standard for southern constitutional provisions with respect to the suffrage. These Mississippi provisions were followed by arrangements seeking to accomplish the same result in Louisiana, South Carolina,

Alabama, Virginia, and other states. So-called "grandfather" clauses were for a while popular, although in most of the states such clauses were definitely limited in time. A "grandfather" clause adopted into the constitution of Oklahoma by amendment of 1910 was held invalid by the United States Supreme Court in the case of Guinn v. United States.[1] This case may serve as an illustration of what was sought to be accomplished by "grandfather" clauses. By the Oklahoma amendment of 1910, provision was made that no person should be registered as an elector unless able to read and write any section of the state constitution. But the amendment went on to say that "no person who was on January 1, 1866, or any time prior thereto, entitled to vote under any form of government, or who at that time resided in some foreign nation, and no lineal descendant of such person, shall be denied the right to register and vote because of his inability to so read and write sections of such constitution."[2]

Limitations in Louisiana

Present types of limitations in the southern states may perhaps best be illustrated by the provisions of the Louisiana constitution of 1921. By the terms of this instrument no one is permitted to vote unless legally enrolled as a registered voter on his own personal application. In order to register, a person is required to be of good character and to understand the duties and obligations of citizenship under a republican form of government. The applicant must be able to read and write, and is required to present an application "entirely written, dated, and signed by him." Such applicant must also "be able to read any section of this constitution or the Constitution of the United States, and give a

[1] 238 U. S. 347 (1915).

[2] At the same time that the United States Supreme Court declared the Oklahoma "grandfather" clause invalid, it also declared invalid similar Maryland legislation. See Myers *v.* Anderson, 238 U. S. 367. "Grandfather" clauses that were to expire by limitation within a certain specified time had already to a large extent accomplished their purposes before the decisions of the United States Supreme Court.

CHAP. XVII

reasonable interpretation thereof." An applicant who is not able to read and write, and who is of good reputation, is entitled to register if he has met the other qualifications; is attached to the principles of the constitution; is "well disposed to the good order and happiness of the State of Louisiana and of the United States"; and "shall be able to understand and give a reasonable interpretation of any section of either constitution when read to him by the Registrar." An additional qualification is prescribed in that every voter under sixty years of age must have paid a poll tax of one dollar *per annum* for the two years next preceding the year in which he offers to vote. Every person liable to this tax is required to exhibit to the commissioners of election his poll-tax receipts for the two years before being allowed to vote.

Basis of discrimination

From the Louisiana constitutional provisions, some of which are rather directly copied from Mississippi, it will be seen that large discretion is left to the registration officials with respect to the educational qualifications for voting. Under these provisions it is possible to apply such qualifications strictly with respect to the voters of one color and liberally with respect to the voters of another color. The constitution makes no direct discrimination, however, upon the grounds of race, color, or previous condition of servitude, and is probably within the terms of the Fifteenth amendment.

Citizenship

Still other qualifications for voting are found in the constitutions and laws of the various states. Citizenship is generally a qualification, although a small group of states, mainly in the middle and farther west, provide that aliens who have declared their intention of becoming citizens may vote as well. There has been a definite tendency away from such provisions. Constitutional amendments making citizenship a requirement for voting were adopted by Colorado in 1902, Wisconsin in 1908, Oregon in 1914, and Kansas in 1918.

Age

The age of twenty-one years is a general requirement by constitutions and statutes in this country. The voting age varies a good deal in different parts of the world. For example, twenty-five was the voting age for German imperial elections before the World War; and twenty years is the voting age in the republic of Switzerland. However, the age of twenty-one appears to be a normal and satisfactory age for voting in this country. It is also the age bound up in English and American law with the acquisition of full legal, as well as political, rights.

Residence

Residence qualifications are generally specified. Most state constitutions contain definite provisions as to the length of residence in the state, county, and the voting precinct or district. The constitution of Illinois, for example, requires a residence of one year in the state, three months in the county, and thirty days in the election district. This is fairly typical of constitutional provisions in other states, although in many cases a longer or a shorter period of residence in the state or the local community is required. Several of the southern states require two years' residence within the state before the right to vote can be acquired.

Educational qualifications

Educational qualifications for voting exist in about one third of the states. The first constitutional provision establishing educational requirements was adopted by Connecticut in 1854. Massachusetts followed in 1857. Other states have more recently adopted similar provisions. Such provisions have in recent years been adopted to a greater extent in the southern states than elsewhere. The provisions adopted in the southern states are perhaps sufficiently typified by those found in the Louisiana constitution of 1921 and discussed above. In many cases they aim to set up educational standards whose enforcement may, to a large extent, be left to the judgment of registration and election officials. Educational qualifications are of doubtful wisdom except in so far as they are self-executing, as an incident to registra-

CHAP. XVII

tion and voting. If a voter, in applying for registration, is required to make out and sign his own application, we have an educational qualification that to a large extent enforces itself. Under a proper form of ballot, the ability to read can be enforced readily as an incident to the actual marking of a secret ballot.

Registration

Provisions are found in a number of state constitutions regarding the preliminary registration of persons in order that they may vote at elections. Some provisions of this character are found in connection with southern suffrage restrictions; but registration provisions are found in other state constitutions as well. Some merely authorize legislatures to enact registration laws, and were inserted because of judicial contests over the validity of such laws when legislatures first began to enact them. In larger communities some form of registration prior to voting is necessary in order to avoid election frauds. In such communities voters of an election precinct or district do not know one another, and the election officials have no means of discovering who is entitled to vote unless preliminary registers have been prepared. For this reason we find a large mass of legislation regarding the registration of voters at certain specified times prior to elections. Such registration laws usually contain strict provisions applicable to the larger communities. In the smaller communities they ordinarily permit what is termed "swearing in" of votes, or voting in a more informal manner. In smaller communities registration officials and party watchers are more apt to know all of those who may be qualified to vote, and a more informal procedure is therefore permissible.

Development since 1865

The development of suffrage qualifications since the Civil War has been well summed up by Professor Charles E. Merriam as follows: "The sex barrier was shattered, if not wholly broken, while the race line was redrawn in the South. Educational and property tests made little

progress, except when employed as a means of reducing the colored vote. The successful entrance of women into the fields of education and industry gave their demands a solidly increasing strength, while the difficulty of the colored man in striking a firm foundation either in education or in industry made it a hard struggle for him to maintain his political or even his legal equality. There was little systematic discussion of the theory upon which persons should be admitted to or excused from participation in the affairs of the state. There was some consideration of suffrage and natural rights and some attention to capacity as the basis of right; but in the main the tendency was to avoid a general and consistent theory. Looking at the three earlier barriers to complete democratic suffrage, namely, class, race, and sex, it is clear that the class limitation was only feebly represented, that of race fell and rose, while that of sex was first slowly and then swiftly removed."[1]

Increased complexity of election machinery

With the increase in the number of voters or of possible voters, there has been a necessary increase in the complexity of the machinery for the conduct of elections. According to the census of 1920, there were in the United States more than 54,000,000 adult citizens. Of course some of these were disqualified for voting, but the massing of even half of this number into elections for the expression of the popular will constitutes an enormous task. In the presidential election of 1920, the first under full woman suffrage, nearly 27,000,000 votes were cast.

Universal suffrage

The expansion of the suffrage does not necessarily increase the level of intelligence or of morals. Our system of government presupposes, and properly so, that every person of full age should have a voice in its conduct. The steady increase in the number of the possible voting population complicates election machinery. A

[1] Merriam, *American Political Ideas*, 1865-1917, p. 99. For further discussion, see Kirk H. Porter, *History of Suffrage in the United States* (Chicago, 1918); and Gilbert T. Stephenson, *Race Distinctions in American Law*.

CHAP. XVII

great increase, due to the introduction at one time of a large mass of new voters, often makes governmental conditions worse, and it may logically be expected to have this result. Property and other limitations upon the right to vote have largely disappeared, but their disappearance does not in itself mean an advance in either the intelligence or the honesty with which government is conducted. It is probable that Prussian cities before the World War were the most efficiently conducted governments in the world; and yet voting in those cities was based upon a plan which gave one third of the voting strength to the portion of the largest tax-payers paying one third of the taxes, a second third of that strength to the large tax-payers paying the second third of the taxes, leaving the great mass of the small tax-payers paying the remainder of the taxes with only one third of the voting power and virtually little means of asserting any authority over their government. But universal suffrage does not mean that every voter has an equal influence in the results of elections. Property has, and will continue to have, in this country an influence out of proportion to the number of votes that it represents. Intelligence, if sufficiently organized and interested, will have an influence out of proportion to the numbers that it represents. Universal suffrage is not a barrier to efficient and honest government. Numbers in voting power are necessary as a democratic check; they do not interfere with the leadership of the more intelligent and the more able elements in the state.

The voter an officer of government

Through elections the voter determines, or should determine, what officers are to carry on government and what are to be the general policies of government. In going to the polling-place on election days, the voter is in reality acting as an officer of government, and upon the proper performance of his duty depends the effectiveness with which government is conducted. The voter must, therefore, be able to perform his duty; and this he can

not do if he is required to vote too much, or if governmental conditions are so organized as to prevent effective and honest leadership in elections.

THE TASK OF THE VOTER

Increased voting

In the early period of state constitutional history the voter was called upon to express himself upon a relatively small number of candidates. He was infrequently called upon to express himself directly upon issues. The task of the voter has constantly increased. In the development of popular government there has been a steady tendency to multiply the number of officers to be voted for directly by the people, and also to multiply the number of questions submitted for the direct expression of popular approval.

The voter's burden

In the early history of state government many state officers were appointed by state legislative bodies, but this plan did not work satisfactorily. In the reaction from this unsatisfactory plan, state constitutions provided for the election of a large number of state and local officers, and this plan is now in existence. In smaller communities, where the voters are familiar with those who offer themselves for office, the plan of electing numerous officers has not proved altogether unsatisfactory, though even in smaller communities the voter's burden is now too great. In larger communities the voter is now so overburdened that he can not vote intelligently. The increase in the number of elective state and local officers was a part of the democratic movement, which also led to the extension of the suffrage and the abolition of property qualifications for office.

Influence of local areas

The increased burden upon the voter has been rendered heavier by the multiplication of governmental areas. Over a given piece of state territory there will frequently be a number of distinct governing bodies, with overlapping territory and conflicting functions. The

CHAP. XVII

voters are asked to elect those who administer each of these separate areas of local government.

Initiative, referendum, and recall

The development of the initiative, referendum, and recall have brought increased burdens to the voter. The initiative and referendum are regarded as additional means of popular control over government; but the voter is unable to express an intelligent opinion upon numerous unimportant questions that are now submitted to him. The recall merely permits an additional election to determine whether a particular officer shall remain in office, and thus adds to the number of possible elections.

Elective and appointive state officers

With the growth of governmental business, the number of public officers and employees has enormously increased. It is impossible to elect all persons who are to conduct the business of state and local government, or to vote on all questions that must be decided in the operation of government. Several state governments now have 10,000 or more officers and employees. The only state officers who are elected in these states are a small group of whom the governor is the most important. However, such officers as lieutenant-governor, secretary of state, auditor, treasurer, and attorney-general are elective in most of the states; and in many states still other officers are added to this list. Many appointive officers of state government perform services just as important as those performed by some of the elective officers. The fact that one is appointed and one elected is an historical accident. If a state or local office was in existence fifty years or more ago, at a time when the movement for electing all officers was at its height, such an office was almost certain to be made elective. In more recent years, when new and important offices have been created by statute, the tendency has been to make the persons holding these offices appointive, either by state or by local authority.

Relative importance of elective and appointive officers

As an evidence of the relative importance of appointive and elective offices, it may be pointed out that in Illinois the director of public welfare, who is appointed by the governor, is responsible during the two years 1921-1923 for the expenditure of more than $20,000,000; whereas the six elective state officers, other than the governor, are together responsible during the same period for the expenditure of less than $5,000,000. The same situation is true of city government and of many of the larger counties. To attempt to elect 10,000 state officers and employees by popular vote would impress every one as foolish; and to attempt to elect all even of the more important officers of the state and local government would be equally foolish. It is for this reason that in state governmental organization the tendency has been to increase the appointing power of the governor and at the same time to enlarge his power of effective supervision over the executive department.

Long ballot

Yet in almost all of the American states we have a long ballot. Not only this, but elections come frequently, and at each election the voter must choose among an enormous number of candidates for a long list of offices. In devising a more adequate method for nominating candidates by political parties, the states have provided for primary elections, which add to the burden of the voter. The voter's burden arises not merely from the number of persons for whom he must vote upon a single ballot, but also from the number of ballots that he must vote at each election, and from the frequency with which he is required to express himself if he is to perform all of the obligations now imposed upon him as a citizen. In many states the number of elective officers for any one governmental area is not so large; but the election of officers for a series of governments covering the same territory makes a lengthy ballot.

Form and size of ballot

When a voter is asked to do too much, he must surrender some of his duties to others; and this surrender is

CHAP. XVII

made to a political party. To aid in the transfer of his duties to the party, we have devised the so-called party-column ballot. The voter usually knows few of the candidates appearing in his party column aside from those for the more important offices; but his party has nominated the others, and legislation makes it easy for him to vote for all of them as a group by placing a single mark at the head of the party column. Cook County, Illinois, has probably had over a series of years one of the longest ballots employed in the country. At quadrennial elections this ballot often contains more than four hundred names. This situation, however, so far as it relates to Illinois, is not peculiar to Cook County, for ballots in other counties of the state often contain more than two hundred names.

Need for a shorter ballot

The judgment of a voter is of no value, either upon the candidates or upon a measure, if he votes ignorantly. The voter's influence in the conduct of government can be effective only when the office is sufficiently conspicuous for him to know something of the candidates who seek his vote, and when the issue is sufficiently important for him to have a real judgment regarding it. Some states have shorter ballots than others, although in all of the states there is need for a reduction in the number of candidates and of measures submitted to popular vote.[1] The overburdening of the voter has led to a movement for the reduction in the number of elective officers. This movement has not as yet been successful, though it has accomplished definite results in a few states. For example, Indiana in 1919 abolished the elective offices of state geologist and state statistician.

Basis for reducing ballot

Popular control over government is destroyed by placing too heavy a burden upon the voter. What can be expected of the normal citizen, assuming that he must

[1] For a discussion of the number of officers voted upon in the various states see *Illinois Constitutional Convention Bulletin* No. 5, "The Short Ballot," pp. 348-351.

earn a living and that he will intelligently give a part of his remaining time to governmental problems? No more can be expected of him, for he will not, and can not, place his political duties higher than his family and social relations. Political issues must be of such a character that he can express an honest and intelligent judgment upon them; else he necessarily surrenders such a personal judgment. Political organizations, whose leaders profit from a complex ballot, urge that to simplify the voter's task will destroy popular government. Popular government will not be destroyed by taking from the ballot such offices as state geologist, state printer, and state statistician, along with a number of others having similar duties. Unimportant officers upon a ballot are in reality appointed by political leaders, under conditions that make it impossible for the voter to enforce any real responsibility. The long ballot necessarily leads to an undesirable dominance of political organizations.

Reduced number of elections

An effort has been made in some states to simplify the task of the voter by reducing the number of elections. In Pennsylvania, by constitutional amendment of 1909, and in Ohio by constitutional amendment of 1912, elections have been reduced to virtually one each year. However, the voter is aided little in expressing an intelligent choice among candidates, and in expressing a real judgment as to issues submitted to him, unless the number of such candidates and of such issues is reduced. The mere consolidation of such expressions into less frequent elections is of little value.

THE MACHINERY OF ELECTIONS

Electoral areas

With the increase in the number of voters, of elections, and of candidates and questions to be voted on, the mechanism of popular voting has become more and more complex. Each local government within a state is ordinarily an area for electing certain officers. In addi-

tion to local governments, other areas have been constituted, frequently with counties as their units, for the election of members of the two houses of the state legislature, members of Congress, circuit or district judges, and other officers. A county of large population may constitute a single unit, or it may be divided into a number of legislative or congressional districts. Electoral areas vary from one state to another, and from one part to another of the same state. Each voter, however, will ordinarily take part in elections for a number of different areas, all of which overlie the territory in which he lives. Periodical reapportionments shift the lines of electoral areas, so that the voter may find himself in one legislative district at one time, and in another district a short time thereafter, when a reapportionment has taken place. Shifting of electoral areas, and the overlapping of one area by another, constitute serious complexities from the point of view of the voter's acquiring real information as to the performance of his functions.

Voting precincts

Voting precincts have been created for the purpose of conducting elections. Such precincts are ordinarily small, with a voting population of from four hundred or less to eight hundred. They constitute the smallest electoral unit. The size of precincts is determined by the time required to mark ballots and to count them. The adoption of woman suffrage has made necessary the creation of a greater number of precincts, or an increase in the number of election officials for each precinct. Each election precinct is ordinarily set up as the local area for purposes of registration. Judges and clerks of election are appointed for the precinct; these in many cases attend to the registration of voters, and on primary and election days actually conduct the election. Ballots are now, in virtually all of the states, printed under government supervision and at government expense. The registration of voters is conducted under careful safeguards, although the necessity for registration is not so great in

the smaller as in the larger communities. Central registration at one place is provided for some large communities. Judges and clerks of election conduct the actual work of election. After the casting of ballots, these officials count the votes and make a return to some central board or office; and at some central place the votes are canvassed for the whole area in which the election takes place. In California cities and counties are permitted to have the counting of votes conducted in a central place, rather than in separate precincts. If state officers are to be chosen, there is usually a local canvass in each community, and the returns of such canvass are forwarded to the state capital, where some state board is responsible for compiling the returns and making the final canvass for the whole state.

Safeguarding elections

Judges and clerks of election are usually appointed as a bi-partizan group, with representatives of each of the two leading parties. Party challengers and watchers are permitted at the polls. Party organizations are relied upon to a large extent to check one another in order to prevent election frauds and abuses. Political parties are not, however, completely relied upon. Corrupt-practices legislation in a number of states prescribes the amount of money that may be expended by candidates, and seeks to throw other safeguards around the conduct of elections. All of the states have legislation against bribery and the more common forms of corruption. However, political parties have too much at stake in elections to be controlled completely by such legislation, and in many states where corrupt-practices legislation exists it is not effectively obeyed. As long as election to political office gives to the successful party organization an opportunity of filling numerous offices and awarding numerous contracts, corrupt practices will in fact exist, no matter what legislation may have been enacted.

CHAP. XVII

State supervision

Ordinarily the state government uses for the election of its own officers the same machinery as is employed for the election of county and local officers, although a separation of election days exists in some states, particularly in Pennsylvania and Ohio. In view of the fact that the state usually chooses its officers at the same elections and through the use of the same election machinery as that of local communities, the state government ordinarily has some machinery of its own for the control of election procedure. An elective secretary of state frequently exercises this supervision, although his authority is supplemented by that of state canvassing boards composed of several officers.

Expense

Elections have become highly expensive, and this expense steadily increases with the increased use of the ballot. The city of Chicago, for example, is divided into more than 2,000 precincts for election purposes, and elections held in that city in 1920 involved an expense of more than $2,000,000.

Absent voting

Many voters are, by the character of their occupations, necessarily absent from their voting-places on the day of election. This situation has led to the enactment of so-called "absent voting laws" in a large number of states. Perhaps the first striking case of absent voting in this country was that of voting by the soldiers during the Civil War. Constitutional questions arose in many states, during that war, as to the rights of state legislatures to authorize the taking of soldier votes in the field, and a number of states adopted constitutional provisions in order expressly to authorize voting by soldiers in this manner.[1] The recent movement has sought to make it possible for a voter, absent from his regular voting-place on the day of election, to cast his vote notwithstanding

[1] For a full discussion of this matter see Josiah H. Benton, *Voting in the Field* (Boston, 1915).

this fact.[1] Legislation for this purpose is desirable, but must be carefully safeguarded.

Plurality elections

Candidates are ordinarily chosen to public office as a result of plurality voting. To take a specific illustration, in 1912 there were three leading candidates for the governorship of Illinois: Edward F. Dunne, Democrat; Charles S. Deneen, Republican; and Frank H. Funk, Progressive. The votes for these three candidates were as follows:

Dunne	443,120
Deneen	318,469
Funk	303,401
Total	1,064,990

The Democratic candidate was elected because he received a plurality, or more votes than either of the other candidates. There were also at the same election other candidates, receiving altogether about 100,000 votes. In this case, therefore, the candidate who received less than 40 per cent. of the total vote was elected. To require that the successful candidate shall have a majority of all the votes cast at an election would often require the holding of another election for the purpose of deciding between the two or three highest.[2] For this reason the rule of election by plurality has been adopted. As long as there are two strong parties, the plurality plan ordinarily means that the candidate who is elected has either a majority of the votes or very nearly a majority.

Preferential voting

In order to obviate a plurality election of candidates, the so-called preferential ballot has to some extent been

[1] For a review of this legislation see P. Orman Ray, *Political Parties and Practical Politics* (revised edition), pp. 351-359.

[2] The New England states originally had a plan that no candidate for governor should be elected without a majority vote; and that the two houses should choose among the highest candidates in case no one received a majority. This plan did not work well, and has been abandoned. Some of the southern states have had a majority rule for nomination in the primaries, with a second primary in case no one received a majority in the first.

CHAP. XVII

adopted. This form of ballot, for example, is used in the municipal elections of Cleveland. Under the preferential plan the voter is permitted to mark his first, second, and third choice. If no candidate has a majority of first choices, the other choices are counted, in order to produce a majority for one of the candidates without holding a new election. The plan of preferential voting appears to have been successful in municipal elections.

Voting upon questions

In voting upon questions, the issue is ordinarily that of adoption or rejection of a definite proposition. Some referendum plans permit the submission of alternate propositions, but this practice is not common. More persons vote upon candidates than upon questions. In voting upon questions it must therefore be decided whether a majority of those voting upon the question shall suffice or whether a larger majority should be required based upon the total vote for candidates. In Illinois and some other states a proposed constitutional amendment must be submitted at a general election and have the approval of a majority of those voting at such election. This means that if there are 1,200,000 persons voting at an election, the proposed constitutional amendment must receive a favorable vote of at least 600,001. If in the general election 1,200,000 persons vote for candidates, and only 650,000 vote upon the proposed constitutional amendment, the proposed amendment must still get 600,001 favorable votes in order to be adopted. A requirement of this character means that a proposed amendment is almost impossible of adoption. In Nebraska a constitutional amendment, to be adopted, must receive 35 per cent. of the total vote in the election, and in New Mexico 40 per cent. These proportions are not prohibitive.

Compulsory voting

There has been a movement for compulsory voting at elections. A constitutional amendment adopted by Massachusetts in 1918 authorizes the legislature of that state "to provide for compulsory voting at elections."

A similar proposal has been rejected by the people of Oregon and California.[1] Compulsory voting has not been adopted in any state by legislation, and to adopt it would seem almost a confession of the failure of popular government. Even though a compulsory voting law may be formally enforced, such a law could only compel a person to go through the motion of voting and could in no way enforce correct or intelligent voting.

Form of ballot

The form of ballot has a distinct influence upon the manner in which people vote. Reference has already been made to the fact that a large number of candidates to be voted for has led to the dominance of party organizations and to the establishment in most of the states of the party-column ballot. Such a ballot makes it easy to vote the straight party ticket, and "splitting" the ticket is thus discouraged. The Massachusetts ballot, which lists all of the candidates for a single office under that office, makes it easier to split one's ticket, and gives no premium to straight party voting. Under the Massachusetts plan, however, the position of one's name upon the ballot has a distinct influence, for a person at the top of a candidate group has a greater advantage than one at the bottom, merely because of human inertia. In the case of ballots both for general and for primary elections, legislation for this reason sometimes provides for rotation of the names in such a manner that the name of each candidate will appear at the head of the same number of ballots.

Ballot forms and questions

In voting on questions, ballot forms also have a decided influence. This influence is well illustrated by the experience of Illinois. In this state before 1891 political parties printed their own ballots. When constitutional amendments or other questions were to be voted upon, the parties, in printing their ballots, ordinarily took a definite position upon the questions submitted, and

[1] See note by James D. Barnett in *American Political Science Review*, XV, 265-266 (1921).

printed upon their ballots a favorable or an opposing action. The voter, in voting his straight party ticket, therefore, voted upon the question as his party decided, although he may not have been conscious of voting upon the question at all. Illinois adopted an official ballot law in 1891, and provided for the printing of questions upon the same ballot as that for candidates, but not in the party columns. Under this plan questions submitted in Illinois between 1891 and 1899 received only about 20 per cent. of the votes cast in the same elections for candidates. Legislation of 1899 adopted the plan of submitting questions upon a separate ballot. When the voter received a separate ballot, his attention was necessarily attracted to the fact that he was to vote two ballots. This change in the mechanical form of voting led to the result that about 50 per cent. of the voters voting upon candidates also voted upon questions. Questions submitted to the voters of Illinois under one type of ballot before 1899 received the vote of about 20 per cent. of the total; and virtually identical questions submitted after 1899 upon a separate ballot received a total of about 50 per cent.

NOTE TO CHAPTER XVII

The mechanism of popular voting has not been subjected to careful analysis. We should know much more than we do about the influence of the form of ballot upon popular voting, and about the extent to which the majority actually rules through the use of the ballot. Little attention has been given to the efficient organization of machinery for the registration of voters and the counting of votes. The story of the voting-machine is an interesting chapter in the history of elections. The actual results of corrupt-practices legislation should be studied. Absent voting laws have now been in force long enough for a careful analysis to be made of their results. Civil War experience with soldier voting may be studied in Benton's interesting volume on *Voting in the Field.*

Effective organization of election machinery is difficult because of the great number of election precincts. Plans for central registration and central counting of votes are of interest as attempts to get away to some extent from the precinct as a unit. The actual voting must always be done in small local areas.

In connection with corrupt practice laws, study should be given to

the influence of an increased number of voters. Where several million voters are to be reached, large sums may legitimately be spent to get information to the voters. A regular party candidate may rely upon his party organization for a large amount of political work, without expense to himself. An independent candidate, on the other hand, has no such aid, and must often spend more money if he is to be successful. It would be interesting to determine the extent to which corrupt practice laws have aided the regular candidates as against more independent office-seekers.

CHAPTER XVIII

THE EXPRESSION OF POLITICAL OPINION

THE TWO-PARTY SYSTEM

Necessity for party organization

AN individual voter can have little influence except as he unites with others. If there were no parties, they would be created, as necessary for the operation of popular government. No individual alone can make his will effective, but in order to have weight he must unite with others who have much the same views as himself. Without organization into groups, individuals can achieve no control over government. The voter can not hope to find a group of other people who entirely agree with him, but must unite with those whose views most nearly coincide with his own.[1] A party will therefore be composed of individuals whose sentiments are somewhat diverse.

Two-party system

How can voters most effectively organize into parties? In the governments of the world we find two systems. On the continent of Europe there is usually a series of parties, no one having a majority, but several uniting at any one time to control the legislative bodies and assume responsibility for the conduct of government. In the United States, on the other hand, there have been almost always two great parties, one controlling the government, and the other in opposition. The principle of majority or plurality rule tends to strengthen the growth and progress of the two-party system, because it gives strength to but one of the two leading parties. The principle of proportional representation tends to

[1] For an acute discussion of the functions of political parties see A. Lawrence Lowell, *Public Opinion and Popular Government* (New York, 1913).

strengthen the growth and progress of more than two parties, because seeking to give each party representation in proportion to its actual voting strength.

Proportional representation

The various methods by which proportional representation may be obtained are not discussed here. The only point sought to be made is that as to the issue presenting itself between a two-party system on the one hand and a multiple party system on the other.[1] Proportional representation is correct in assuming that no body of people divides automatically into two groups upon political issues. It further assumes as desirable the representation of all views that may be held by any large group in the community. The majority or plurality plan assumes correctly that some one group must necessarily be responsible for the conduct of government. It further assumes that this group should be chosen by a majority or plurality of the voters.

Advantages of two-party system

Under proportional representation a single party is less likely to have a majority in legislative bodies; and the group controlling in such bodies is more likely to be formed by the coalition of the representatives of several groups. This is true on the continent of Europe. When the representatives of several parties unite in a coalition, those of each party must give up something in order to work together; and the result may be no more representative of the desires of a majority of the voters than if a single larger party had in the first place a majority in the representative body, although perhaps actually representing less than a majority of the voters. Not only this, but a coalition of parties is less stable in its organization and policies than is a single party. The real issue between majority or plurality representation on the one side, and proportional representation on the

[1] For a discussion of some of the technical details of proportional representation see Willoughby and Rogers, *Introduction to the Problem of Government*, pp. 263-275. See also H. L. McBain, "Proportional Representation in American Cities," *Political Science Quarterly*, XXXVII, 281-298 (1922).

CHAP. XVIII

other, is this: Is it more important to have each distinct point of view in the community represented by a party organization than to have a large majority party faced by a single minority party? The two-party system is a more effective governmental device, though compressing political sentiment arbitrarily into two channels, while the multiple-party system arbitrarily compresses great numbers of diverse views into a small number of parties more than two. The multiple-party system then forces a union of small parties in order to operate the government.

Application of proportional representation to state government

So long as we have a state governor, elected for a fixed term and independent of the legislative bodies in the exercise of his powers, proportional representation will have little place in state government. Under such a plan, the governor must continue to be elected upon a plurality or majority basis; and it would be distinctly unwise to have a scheme of electing legislators that might aid in promoting political disharmony between the governor and the legislative bodies. Proportional representation for the election of state legislative bodies appears almost necessarily to presuppose a change in the relationship between governors and legislatures. In local government it has been most successfully applied as a part of the commission-manager system, under which the chief executive officer is chosen by and responsible to the local representative body.

Function of the opposition party

Under the two-party system it is the function of the party out of power to oppose and criticize. If these functions are not performed, the opposing party fails of its duty. Perhaps the worst political conditions develop when the leaders of two parties unite into a bi-partizan combination. The two-party system works best when one party is eager to take advantage of the mistakes of the other. In many states a single party dominates over a long period of time. In these political criticism comes largely through organized factions

within the single party. The most serious defect in the party system as it operates in the American states is that, in many of the states, one national party is overwhelmingly stronger than the other over long periods of time. This situation is occasioned by the dominance of national parties, and probably would not be changed by the adoption of proportional representation for the choice of state legislatures. The interests of the voters are, as a rule, not sufficiently safeguarded by the possibility of organizing opposing groups within a single party.

Party issues

It is theoretically possible to have separate and opposing parties for each large issue, such as prohibition; but this is impracticable. When an issue becomes of sufficient importance, one of the two parties in a two-party system must sooner or later deal with it. In fact, when an issue becomes sufficiently important, both parties are likely to take it up. No real issue between two leading parties can be made upon a question of little popular interest or upon which the sentiment is overwhelmingly one way. Such an issue must be one upon which the public may be expected to divide somewhat evenly, though political leaders do not always guess accurately as to this matter. Issues often start with small support and are finally indorsed by both parties. The final success of a new issue has perhaps as much chance under the two-party system as under the multiple-party plan.

Small parties

Under the two-party system, small parties and independent voters are not powerless. A small party will occasionally gain enough votes from a larger party to win success and to become itself a larger party. Smaller parties often determine the choice as between two larger parties. It is frequently the case that a voter who is normally affiliated with one of the larger parties will not vote with the opposing party, but will vote the ticket of a smaller party. A sufficient number of such shifts

CHAP. XVIII

to a smaller party will often give the opposing party a victory. By changing from one party to another independent voters decide the result in many elections. But without parties popular government can not be operated.

LEGAL CONTROL OF THE PARTY

Official ballot

Political parties originated as voluntary organizations, uncontrolled by state legislation. To-day they are in reality no longer voluntary organizations, but are rather organs of the government itself, controlled in great detail by legislation. One of the first respects in which political parties came under official control was the printing of the ballot. Before 1888 parties printed their own ballots, and naturally determined also the conditions under which the names of their party candidates should appear upon such ballots. Serious abuses arose under this arrangement, particularly with respect to the secrecy of the ballot. Beginning in 1888, the states adopted the official or so-called Australian ballot.[1] Under the official ballot plan, ballots are printed at governmental expense. This expense is usually borne not directly by state government but by the local bodies charged with the conduct of elections. In providing for the official printing of ballots, state laws at the same time necessarily determine the conditions under which party organizations shall be entitled to have the names of their candidates appear upon such ballots. This involves a definite recognition of party organizations and a determination of the manner in which such organizations shall certify the candidates of their party to appear upon the official ballots.

Form of ballot

But with the adoption of the so-called Australian ballot political parties still had, and have, sufficient power to determine the form of that ballot. Massachu-

[1] For a history of its development see E. C. Evans, *History of the Australian Ballot System in the United States* (Chicago, 1917).

setts and a few other states have adopted a plan under which the names of the candidates are grouped under the titles of the offices; though under the Massachusetts plan the party to which each candidate belongs is indicated after the name of the candidate. This arrangement of the ballot makes it necessary for the voter to mark separately on his ballot the name of each candidate for whom he desires to vote. However, most of the states have adopted the so-called "party-column" ballot. The party-column ballot varies in different states, but its fundamental idea is that all of the candidates for one party shall appear in a single column, so that a voter may vote for all of them by placing one mark upon the ballot. If the voter does not wish to vote the party ticket, he is put to the burden of marking separately each of the candidates for whom he wishes to vote,[1] or at least each of such candidates not belonging to his own party.

Effect of official ballot upon party

The official ballot is generally so devised as to aid straight party voting. The result of the movement for the official ballot in most of the states, from the point of view of party organization, may therefore be summed up by saying that the party has lost the opportunity of paying for the printing of the ballots, but has preserved all of the advantages of party devices and arrangements upon the ballot itself. This, of course, does not tell the whole story; for through the officially printed ballot a distinct gain has been made in that a few states do not have the party column, and in that in all states secrecy has been accomplished and fraud discouraged.

Nominating methods

The next great reform movement leading to a statutory control over parties was that having to do with primary elections. Serious abuses in the party convention system for the nomination of candidates and the framing of party platforms led to legislation regulating

[1] For a discussion of ballot forms see P. Orman Ray, *An Introduction to Political Parties and Practical Politics*, revised edition, pp. 330 *ff.*

CHAP. XVIII

the convention; but such regulation did not appear sufficient. The primary election system has now been established in virtually all of the states, although recently there has been a strong political movement against primary elections and some gain for the older convention system.[1]

Plurality and majority nominations

Primary election legislation varies materially in the different states. The details of these variations can not be discussed here. In the southern states the primary is a means of choosing candidates of a dominant party, and really constitutes for all practical purposes an election. The normal rule for primaries and elections is that a plurality shall nominate or shall elect. Under the plurality plan, if three candidates divide the votes among themselves with virtual equality, it is possible for nominations or elections to be made by slightly more than one third of the votes. In some of the southern states, therefore, it is provided that if a candidate in a primary does not receive a majority of the votes, a second primary shall be held, limited to the two highest candidates in the first primary. This, of course, involves the holding of two primaries, at rather great expense. For this reason, Florida has adopted the plan of preferential primary voting. Under this plan a voter in the primary is permitted to indicate his first and second choices. If no candidate has a majority in the primary, the first and second choices are counted, in order to give a majority to some one of the candidates without the holding of another primary election.[2]

"Open" and "closed" primaries

The chief difference between primaries in the various states is that between the "open" primary and the "closed" primary. A good example of the "closed"

[1] For a discussion of the primary movement see Charles E. Merriam, *Primary Elections*. See also the more recent book by the same author entitled *The American Party System*. For recent efforts to destroy or restrict the primary system, see an article by Professor Ralph S. Boots in the *American Political Science Review* for August, 1922.

[2] The system of preferential voting in primaries has been tried in about a half dozen states, but has been abandoned by Minnesota and Wisconsin.

primary is found in Illinois. Here a voter, upon entering the polling-place, must announce his party affiliation. If he has voted in a party primary during two preceding years, he can not vote in the primary of another party, and his vote is subject to challenge if he seeks to do so. Under this plan, it requires two years of abstention from primary voting in order for a person to change his party for primary purposes. In New York, Pennsylvania, and some other states, a closed primary is more effectively maintained by requiring registration of party affiliation in advance of the primary. Under the Wisconsin "open" primary system, each voter determines without restriction at each primary election what shall be his party affiliation. Both the open and closed primary plans have their disadvantages. The closed primary system, under such severe restrictions as those existing in Illinois, penalizes a voter who wishes to change his party affiliation. The closed primary plan is naturally approved by party organizations themselves, and is now the prevailing system.

Party control of government

Control by law over the official ballot and over the methods of party nomination has naturally been followed by a detailed regulation of the machinery of party organization. Through primary elections, the party voters in most of the states choose their party committeemen. State laws determine the power of such party committeemen, and also determine the manner in which they shall form the various party governing bodies. State laws also determine what party organizations shall frame platforms. Political parties are still voluntary in their membership, although the closed primary, where it exists, imposes a penalty on change of parties. Governmental regulation of political parties has largely been occasioned by a feeling that party organizations themselves control the government, and that they should, rather, be controlled by the government. However, governmental regulation has not weakened political parties. This

CHAP. XVIII

result was naturally to be expected, as long as party organizations fall heir to the heavy duties that have been imposed upon, and that can not possibly be performed by, the individual voters. Theoretically, government now controls political parties; but actually the party organizations still control government.

ORGANIZED EXPRESSION OF POLITICAL OPINION

Limited choice of voter

In an election the voter really does nothing more than express a choice between two leading candidates. Where there are two leading tickets in the field, a sufficient number of independent voters may cause the election of some persons upon one ticket and some upon the other. In the final analysis, however, all that the voter does is to express a choice as between two tickets, or as between the individual candidates on two tickets.[1] Except where a large third party is competing with the two major parties, the voter who votes for candidates on other tickets than those of the two leading parties either throws his vote away, or, by failing to vote with the larger party with which he usually casts his ballot, actually helps the other larger party to elect its candidates. Small parties have little influence upon the final result in elections, except as they draw votes away from one of the two larger parties.

Nomination determines election

In view of this fact, the two major parties, through their machinery for nominating candidates, ordinarily determine who shall be finally chosen at the general election. Party nominations of these parties determine ordinarily that Mr. A, the Republican nominee, or that

[1] Under the cumulative plan of electing representatives in Illinois, the voter actually has no choice, in many districts, as between candidates upon two tickets. Each party nominates only the number of candidates whom it thinks it can elect. In the election of 1918 for a choice of 153 representatives, the Republicans nominated 93 candidates and the Democrats 83. For a full discussion of the cumulative plan in Illinois see Blaine F. Moore, *History of Cumulative Voting and Minority Representation in Illinois* (University of Illinois Studies in the Social Sciences, Vol. VIII, No. 2).

Mr. B, the Democratic nominee, shall be the person to hold the office. The general election determines which one of the two shall hold the office. The primary election, or the other machinery by which the parties respectively nominate Mr. A and Mr. B, therefore, determine just as truly as does the final election who shall hold the office.

How nominations are determined

In party primaries (and in party conventions, in so far as they nominate) there will usually be a number of contenders for each party nomination. Our election machinery is so complicated, and the officers for whom we vote are so numerous, that the process of sifting out those who shall be the party candidates for each office in the election is a highly complex one. The process is, indeed, so complex that the party organizations almost of necessity must, and practically will, determine who the party candidates shall be. There is always in each party a central organization composed of persons who devote their time largely to politics, and this organization will determine usually who the party's candidates shall be, because they will have the machinery for getting out the vote in the primary. Regret it as we may, it is difficult to get a large proportion of the members of a party to vote in their party primaries. This is so true that Mr. Charles E. Hughes and others have strongly urged that the party organization itself (composed of party committees) present a ticket which shall have a sort of preferred status with reference to party voting in the primary itself. Ordinarily the candidate who receives a plurality obtains the nomination, even though that plurality may be a distinct minority of the total vote in the primary. The party organization will usually be able to determine who shall obtain this larger number of votes, and with it the nomination. If there are several rival group organizations in a party primary, each of their candidates will have a possibility of obtaining the nomination; the party voters in the primary will, under such

CHAP. XVIII

conditions, have a choice as among the candidates of these rival groups. A candidate in the party primary who is entirely independent of the party organization, or of a group organization within the party, ordinarily stands little chance of nomination.

Importance of party organizations

Party organizations determine who shall be the party nominees; and through control of nominations they determine the voter's choice really as between two candidates at the general election. We have government by party organizations, with the possibility of revolution through independent voting in the primary, and of choosing as between one party and another in the election, if parties are somewhat equally balanced.

Composition of parties

We frequently think of political parties as two closely organized armies, lined up in battle array against each other on specific questions of public policy. Actually, parties are not so organized. Except in times of great political upheaval, a political party obtains its membership largely as a result of birth and tradition, though of course there is always a small body of independent voters who change from one party to another or split their tickets at each election. The vote that wins for the political party in any election is made up of various elements: (*a*) a relatively small professionalized group, who constitute the party organization and control the party machinery; (*b*) the traditional followers of the party, who will vote for its candidates, whoever they may be; (*c*) the more independent voters, who "split" their tickets or bolt the party, and who must not be offended too seriously, if the party is to win. Changes of party control in government come primarily as the result of action by this group; and in order to effect the defeat of a party it is necessary in some states to change only a small proportion of the total vote. Where there is a single dominant party, the voter's influence must come through the existence of rival groups within the single party.

Party principles

When it is first created, a party usually stands for some political principle as opposed to other parties. Ordinarily, however, parties are merely convenient devices for the operation of government, and for presenting political issues to the voters when such issues arise. Political issues are not created merely by the existence of two opposing parties; and during much of the time no real issues exist upon the basis of which parties may oppose each other on principle. At such times parties proclaim principles, but have no sharp differences. They serve their purpose if they take a stand upon issues when they do arise, and present to the voters an opportunity for choice upon such issues. When issues are altogether absent, they still perform the functions of narrowing the choice of the voter, and of uniting candidates into groups for final elections. A political party exists as an organization, independent of any principles that it may profess; and a large proportion of those who undertake the profession of operating party machinery are chiefly interested in the success of the party as such rather than in any specific principles that it may have. To a great extent a party organization reflects opinion which it thinks will succeed, rather than leads that opinion; and in state government parties are but one of the forces influencing action.

State principles

There are few party principles in state government; for political parties are primarily based upon so-called national principles. Parties, however, are useful in state government as long as they are responsive to the views and needs of the people. There are few party alignments in state legislation or administration, and only occasionally are state judges elected squarely on party issues; but state government operates best when its legislative and executive departments are in political agreement, and when there is a party cohesion that makes it possible for the two to work together.

CHAP. XVIII

The political expert

When regarded as an organization to make effective the combined judgment of its members, a political party is the servant of those who belong to it. But government is now so complex that the party organization itself must do a great mass of the work of which its less active (and more numerous) members can in the nature of things know little. The members of the party become its servants rather than its masters, and the control of parties becomes a highly expert and professionalized service. Occasionally reform movements will raise popular sentiment to white heat and dethrone party leaders who have abused their powers; but the result is temporary, and little has been gained, because governmental organization is as complex as ever and the need for the political expert continues.

Functions of the political expert

The political expert (who is termed "boss" if sufficiently successful) has the tasks of keeping the party organization together; getting party members to the polls; and rewarding political service. He can perhaps be more successful if he holds no office, because by holding office he divides his energies and subjects himself to personal criticism for possible errors of political conduct. He will be powerful as long as complex governmental conditions exist. The party must continue to be the agent of popular government, but as long as the work to be performed by the party is too complex, the party will remain the servant of its leaders, rather than of its members. The successful management of our highly complex political machinery is comparable in magnitude and difficulty with the larger undertakings of private business.

Party rewards

With party organization a vast and complex mechanism, nomination and election to office almost of necessity come, in most cases, as a reward for service in the party organization.[1] No man or woman who lacks the support

[1] The spoils of office and the grosser forms of political corruption are the lesser coin of political organizations. The offices are relatively few. Gross corruption reacts upon those who practise it. But there are con-

of a party organization has much opportunity either to be nominated or elected, though an independent candidate may occasionally win, in case of great popular upheaval. Even under such conditions, the independent candidate who wins must almost necessarily have financial resources sufficient to set up a rival organization of his own. Those who come to office usually do so only after a long apprenticeship in party service, which has worn off the fine edge of youthful idealism. In England, with its less complex organization of governmental areas, its less sharply defined lines of division between governmental departments, and its simpler ballot, the parties are equally as important as in this country; but political leadership is more effectively developed, and persons holding high governmental positions are themselves the leaders, rather than the servants, of their parties. In any popular government the views of the people, when expressed, must control; but the popular will must have an adequate method of expressing itself and of achieving results through leaders whom it chooses. Under our system the party organization is the master of the party and of the people. The difficulty is not so much that of lack of interest or attention of the voter: the real question is whether our government is so organized that it permits the citizen to exert an influence in the time he can give to politics, and whether it develops the best type of political leadership. Politics and government must always, to a great extent, be managed by professionals—by men and women who devote themselves primarily to the career of interpreting the popular will and carrying it into effect. The career of politics, properly conceived, is the highest of professions. Politics is but a name for the profession of operating government.

Parties as servants of the people

Every organization, and every government, must have its governing group. In a popular government the gov-

tracts to be let, without too great an insistence on standards and quality, and other similar opportunities for continuous profit.

CHAP. XVIII

erning group should be (1) one to which all persons may have access, (2) easy to change, and (3) responsive to the deliberate will of the people. Our governing group is made up of professional office-holders and of political managers who may or may not hold office; and it is largely responsible to others rather than to that formless body which we term the public. The problem is not that of doing away with parties, for they are necessary as a means of popular expression, but of so organizing the government and parties that parties and their leaders may not be the masters, but the servants, of democracy. This can be accomplished only by simplifying the means of holding government responsible to the popular will. The business of government itself is complex and may become steadily more so; but the means of holding government responsible to the people can and must be simplified, for complexity at this point destroys popular responsibility.

Importance of government as a business enterprise

The voter is in the position of a stock-holder in the largest and most important corporation that exists. This corporation makes assessments upon its members, and its success is judged not by dividends but by work accomplished. The stock-holders can not run this corporation, but must choose a governing group responsible to themselves. They have organized this single undertaking of government into a number of independent corporations over varying territorial areas; and over each of these corporations they have set, not a single responsible organization, but a group of officers each independent of the other. Such a plan would soon fail in private business. It does not succeed in the management of public business; but it continues to exist because bad government is better than none, and because it has back of it the taxing and borrowing power of the state. We have to such an extent overorganized and overused the machinery for the expression of popular opinion that the

very machinery itself destroys the possibility of such expression.

Responsible leadership

The governmental structure is so divided that no single organization for its control can readily be set up within the government itself. Our governing group has for this reason largely been set up outside of government, and it often exercises a united control over the several locally independent systems that form the government of a single area. Our governing group, which is now outside of and not responsible for the conduct of government, must be brought within the government itself and made responsible. This absence of political leadership within the governmental organization itself was clearly and concisely put by Mr. Elihu Root in the New York constitutional convention of 1915:

"They call the system—I don't coin the phrase, I adopt it because it carries its own meaning—the system they call 'invisible government.' . . . The ruler of the state during the greater part of the forty years of my acquaintance with the state government has not been any man authorized by the constitution or by the law; and, sir, there is throughout the length and width of this state a deep and sullen and long-continued resentment at being governed thus by men not of the people's choosing. The party leader is elected by no one, accountable to no one, bound by no oath of office, removable by no one. . . . I assert that this perversion of democracy, this robbing democracy of its virility, can be changed as truly as the system under which Walpole governed the commons of England, by bribery; as truly as the atmosphere which made a credit mobilier scandal possible in the Congress of the United States and has been blown away by the force of public opinion. We can not change it in a moment, but we can do our share." Mr. Root's proposal was the simplification of government. The issue then before the New York constitutional convention was the

CHAP. XVIII

reduction in the number of elective state officers. The restoration to the voter of real control over political parties, and thus of control over government, can come only through the simplification of the ballot. This can come through the reduction of elective officers, state and local; through the reduction in the number and complexity of areas of local government; and through some restriction upon the number of issues of policy to be submitted for popular approval.

Non-partizan ballot

Legislation has sought in some cases to establish a non-partizan ballot, particularly with respect to judicial and municipal officers. Locally, this development has been particularly strong in commission and city-manager charters. The non-partizan plan in many cases permits candidates to be nominated by petition. Candidates so nominated are then voted upon in a primary election, and the two highest in such election are submitted for the decision of the voters at the general election. So employed, the plan requires two elections—one a primary election without party ballots, and the other a general election, still without any party symbols upon the ballots. In the election of aldermen for the city of Chicago, under an act passed in 1919, a preliminary election is held in February, at which anybody may offer himself. If any person receives a majority of the votes at this election he is declared elected. If no candidate in a ward receives a majority of the votes at the preliminary election, then the two highest candidates in that ward go upon the ballot for another election. In both preliminary and final election, no party designations whatever are permitted to appear upon the ballot.

Usefulness of non-partizan ballot

The non-partizan ballot is serviceable where the issues are not directly political. The use of the non-partizan ballot is aided in some cases by separation of municipal or judicial elections from the general election. If a primary is being held for the nomination of partizan candi-

dates, or a general election upon a partizan basis, party lines are pretty sure to be drawn, even as to the offices for which a non-partizan ballot is used.

Experience in Minnesota

Partizanship is not destroyed by the use of the non-partizan ballot in the cases where the issues are really political in character. Since 1913 members of the Minnesota legislature have been chosen under a non-partizan method of nomination and election. The way in which the non-partizan system of legislative election operates in Minnesota is well expressed by the following quotation from one familiar with the facts:

"Practically every one in voting for members of the legislature in this state finds out the party affiliation of the candidates before voting. The leading political parties openly indorse their candidates in circulars and newspapers before election, so that it is not difficult to identify the Republicans, Democrats, etc. This has become even more true since the active participation of the non-partizan league in Minnesota politics. I am told on good authority that every one in the state legislature understands the party affiliations of the members, and that the radical groups, non-partizans, socialists, hold caucus there. There is a discernible tendency on the part of the Democrats to join forces with the Republicans in opposition to the radical minority upon issues which are of state or local import. At the close of the last session of the Minnesota legislature Governor Preus published a letter thanking the Republican members for the support which they had rendered the party and the state. There seems, in my mind, to be little doubt that the Minnesota Legislature is non-partizan only in name, and that the chief result of the non-partizan method of nominating and electing candidates is to destroy any effective party responsibility for what goes on during the session."[1]

[1] Letter of August 6, 1921, from Professor Robert E. Cushman of the University of Minnesota.

CHAP. XVIII

Political organization remains

In Minnesota the governor is still elected on a partizan basis, and it is difficult, if not impossible, under such conditions, to have a really non-partizan legislature. Not only this, but it is sought to elect a non-partizan legislature at the very election where for other offices partizan contests are taking place. An attempt to establish the non-partizan election of judges failed in Iowa under similar conditions. In Chicago, difficulties in the non-partizan election of aldermen exist, because the mayor is still elected on a partizan basis; though here municipal elections are separate from national and state contests. Non-partizanship in state government is now limited by two conditions: (1) The combination of state and national elections. As long as this union continues, partizanship will exist, even though all state and local officers are made elective on a non-partizan ballot. (2) The complexity of political machinery. Whether their names appear upon the ballot or not, parties will control as long as their organization can determine who shall be nominated and elected. Under the partizan system the winnowing down of candidates to be voted upon at the general election is done under purely party auspices. Under the non-partizan plan parties still exist if the issue is directly political. The non-partizan ballot can not do away with political organization, though it may reduce the influence of national parties in local elections. It is out of the question to do away with political parties where a definite union of forces is necessary to political success. Parties can not be reduced to their position as servants of popular government so long as the detailed work to be done makes the party organization, as such, more important than party principles or individual candidates. The non-partizan ballot may operate more satisfactorily than the partizan method of nomination and election under certain conditions; but a mere change in the form of ballot will not of itself accom-

plish a material change in the actual operation of nominating and electing machinery.

Forces determining political action

The forces that control and determine state governmental action operate to a large extent through political parties, though themselves political only in the sense that they desire governmental action. They are the social and economic forces back of party organization. Though using parties as agencies, they do not operate along purely political lines. The forces obtaining one governmental action differ from those obtaining another; they form and reform to meet new issues as they arise. Sometimes one group will be so strongly organized that it obtains legislation laying down a state policy; while at the same time an opposing group is strong enough to prevent the enforcement of that policy. Groups sometimes use influences whose public inspection is not desired.

Political party a social organization

Political organization for the purpose of operating government is but a part of the social organization of the community. All the forces that go to form the opinions of individuals have their influence upon political life. These forces are hereditary, social, economic, religious. They are influenced directly by the means through which individuals obtain information. Whether or not they have full popular confidence, the newspapers and the magazines largely determine our political thinking. They in turn have their points of view determined by the influences that control them. "Travel and trade, the wires and radio, railroads, highways, ships, and in the coming generation aëroplanes, are, of course, of the utmost influence on the circulation of ideas. Each of these affects the supply and the quality of information and opinion in the most intricate way. Each is itself affected by technical, by economic, by political opinion." [1]

[1] Walter Lippman, *Public Opinion*, p. 48. See this book for an acute discussion of the whole subject considered above.

CHAP. XVIII

Economic changes

Variations in the character of political control take place with changes in the character of economic and financial organization. When we had a great and rapidly settling frontier, the tone of political life was largely determined by the fact that the ownership of land was easily within the reach of all. More recently a unified control of the financial and industrial resources of the country has developed, with large powers in the hands of single individuals. Corporate organization, with ownership of property largely in stocks and bonds, readily lends itself to a more centralized organization of business. Certain financial control centers in New York. A unified labor organization has been built up with headquarters in Washington. Agencies set in motion from these centers are often as influential in a distant state as are any of the forces within the limits of that state itself.

Relative influence of individual views

Upon each specific question presenting itself for governmental action many citizens will have neither information nor opinion. They will naturally follow the leadership of those in whom they have confidence. Sometimes the leadership will be that of a group rather than of an individual. Certain groups in the community have, and will continue to have, a large influence both upon legislation and upon its administration in particular fields. For example, physicians and others interested in sanitary matters have an influence upon health legislation and health administration greatly out of proportion to their numbers; and a similar situation exists in a number of technical fields within which governments operate. Of course a technical group, such as that interested in sanitary legislation, often desires the adoption and administration of a governmental policy which can not be put into effect because the non-technical elements of the public are unwilling to agree to it. In many fields, however, it is true that the direction of legislation and of governmental administration is determined by a small

group, although in all cases the views and actions of this group may be materially modified by general public attitude or lack of interest in the particular matter. The highest number of votes wins an election, but does not determine what view shall finally prevail. President Lowell has properly called attention to the fact that a vigorous minority will finally prevail over a lukewarm majority. "If 49 per cent. of a community feel very strongly on one side, and 51 per cent. are lukewarmly on the other, the former opinion has the greater public force behind it and is certain to prevail ultimately, if it does not at once. The ideas of people who possess the greatest knowledge of a subject are also of more weight than those of an equal number of ignorant persons." [1] Of course, the actual results of a particular election are not determined by the strength or weakness of view of those who have voted one way or the other. The way people are to vote in an election is, however, largely determined by the vigor with which a view is pressed. If a vigorous group in the community, even though small, consistently advocates a measure that has no strong force opposing it, that measure will finally be adopted. The same thing is true in legislative bodies.

Non-political organizations

Influence in the conduct of government is to a large extent exercised by organizations not constituted primarily for political purposes. Of this character are groups representing official bodies (such as city officers), business, trade, and professional organizations. If sufficiently persistent, such groups are largely successful in achieving their desire. Their influence on legislation has been discussed in an earlier chapter. Such organizations often keep in close touch not only with legislative matters but with the detailed administration of government, and occasionally they seek to influence judicial action as well. Legislation is frequently special in its origin, even though its form of enactment may

[1] Lowell, *Public Opinion and Popular Government*, p. 13.

CHAP. XVIII

be general. Often in a legislative session laws are enacted because they are desired to meet a particular situation or because of the interests of a particular group. But these laws may, at the same time, be in the interest of the community as a whole.

Civic organizations

There are many organizations of a purely civic character whose chief interest is the bettering of governmental work. Such organizations may be regarded as more impartial than organizations representing particular trades, professions, or business interests. They are naturally more impartial than organizations of municipal and county officers, which commonly seek, not merely the public interests, but also the interests of those who hold public office. It must be admitted, however, that civic organizations are, on the whole, the least effectively organized for bringing influence to bear upon either legislation or administration. This is partly accounted for by the fact that other organizations have more selfish interests at stake; selfishness is a strong promoter of effective organization.

Group influences

Government, and particularly legislation, often appear to be dominated by group interests, rather than by any one dominant public interest. Around a state legislative body may be found all types of professional, business, and trade lobbies, some one of which appears to dominate the situation with respect to its particular interest. However, we have never had in the states a government by group interests. Although each group will have certain interests that it seeks to present and to further, the solidarity of these separate groups is not so complete as it appears. Each group has a solidarity of interest as to certain specific matters; but in most other matters its interests are identical with those of others in the community. There are more common interests in government than special ones; though at times, and particularly with respect to certain types of legislation, the special interests of particular groups are

more distinctly manifested than the interests which such groups have in common with other people of the community.

Territorial basis of representation

The territorial basis of representation is still justified because it unites the interests of all the groups living within a particular area. While the interests of organized groups will continue to be influential, and while the influence of such groups has enormously increased in recent years, no real basis exists for urging that government should be organized upon the basis of representing these groups. The theory that legislative bodies should be made up of representatives of the different trades, professions, and occupations has little to commend it under our system of popular government; and such a plan would necessarily lead to the strengthening of lines of division between different social and industrial elements in the same community. It may be that a "physician living in the eleventh precinct has far more community of interest with a physician living in the fifth precinct than he has with a broker who lives around the corner."[1] However, the physician's community of interest with the other physicians living in the same community is an interest in medical matters; while his interest in proper sanitary conditions and in garbage disposal in his section of the city will necessarily be much closer to that of the broker living around the corner than to that of a physician living in another part of the community or in a different community.

Share of social and economic groups

But social, economic and professional groups have an important share in the conduct of government. The voters as a whole can have only certain broad notions of government. There is not and cannot be a common popular judgment as to most of the detailed work of government, for this work requires in many cases an intimate and technical knowledge of particular fields of activity.

[1] See article by H. A. Overstreet referred to in Willoughby and Rogers, *Introduction to the Problem of Government*, p. 243.

State government performs a number of technical services; and in their performance faces, in fact, a number of separate technical constituencies. For example, the direction of legislation and the effectiveness of administration with respect to safety in mines will largely be determined by the organizations of mine operators and mine workers. In a broader field, that of health administration, governmental policy will largely be determined by the medical profession and the organized social agencies interested in sanitation. Although the state has the details of its activities largely determined by separate constituencies, the state undertakes such activities because of their value to the community as a whole. The general public can, however, have little knowledge of the detailed performance of many of the state's functions. Not only this, but day-by-day administration of most state functions is not news and will never be reported in the newspapers, because it lacks the qualities of either the spectacular or the unusual. If it were reported it would not be read, though the possibility of newspaper reporting always constitutes a check upon gross inefficiency or dishonesty. Specific groups in the community must always be relied upon to influence the direction of legislation and the character of administration in the specific fields of their interests.

NOTE TO CHAPTER XVIII

Perhaps the most useful volume upon the subject of this chapter is Albert M. Kales, *Unpopular Government in the United States* (Chicago, 1914). For the forces underlying the expression of political opinion, resort should be had to A. Lawrence Lowell, *Public Opinion and Popular Government* (New York, 1913); and to Walter Lippman, *Public Opinion* (New York, 1922). Arnold B. Hall, *Popular Government* (New York, 1921), deals with the problems of both this chapter and the succeeding one.

Specimen ballots should always be used in the discussion of ballot forms. It would be important to discover to what extent there is a more or less permanent office-holding group in the states, and what is the influence of that group.

It is important to determine the political influence in each state and community of the growing number of public employees. In this

connection it may be worth while to consider the probable increase of this influence with the undertaking by the government of large new enterprises.

In this chapter reference has been made to the relationship between political organization and the corporate form of business organization. It will be valuable to study this relationship, and also the bearing upon political organization of the more coördinated organization of industry and society. The more rapid means of communication and transportation have been essential elements in the development of a more coördinated organization.

CHAPTER XIX

THE INITIATIVE, REFERENDUM, AND RECALL

THE initiative, referendum, and recall have different purposes, but have in common the fact that they seek to extend popular control over government, and that they lead to increased popular voting.

Referendum

A referendum is a popular vote, either required or optional, upon a measure before the measure becomes finally effective. It involves a power of the voters, by direct action, to reject a proposal, and is therefore essentially a method of checking or rejecting an enactment of a legislative body, either state or local. It imposes an added limitation upon the power of legislative bodies, and in so far as popular votes defeat proposals of these bodies, the result of the referendum is necessarily conservative. An illustration of the conservative character of the referendum will be found in legislative actions in the states of Washington and Ohio in 1921. The legislatures of both of these states enacted administrative reorganizations, and in both cases attached emergency clauses making the referendum inapplicable, because of the fear that such reorganizations would be unpopular with the voters. This was done, even though it is generally recognized by students of state administration that the laws passed in both states represent distinct advances in the field of governmental organization.[1]

Compulsory referendum

Many measures are subject to a compulsory referendum. They *must* receive popular approval before coming into operation. In all of the states, except Delaware, no constitutional change may become effective without

[1] In both states the emergency clauses were sustained by the supreme court.

a popular vote of approval. In a number of states no banking law or amendment of a banking law may be enacted without the approving vote of the electors. In a number of states, also, no state debt beyond a certain minimum may be incurred without a legislative act submitted to and approved by the people of the state. In these cases, a popular vote is an essential element in the adoption of a constitutional amendment or the enactment of such a law. Under state constitutions and state laws there are a number of local matters to which a compulsory referendum applies. This is particularly true with respect to local action for the incurring of municipal bonded indebtedness. The compulsory referendum has been long in existence as an American political institution, and is well established with respect to proposals for constitutional change.

Optional referendum

The term "optional referendum" is applied to the cases in which a popular vote may be required, but is not essential to a measure's coming into effect. The ordinary plan of optional referendum is that a law or ordinance comes into effect by virtue of the action of the state or local legislative body unless a popular petition is presented and an unfavorable popular vote defeat or repeal it. This is the type of referendum that has been more recently established by constitutional provisions, beginning with South Dakota in 1898. In fact, it is what we usually mean when employing the term "referendum"; for the more recent adoption and political discussion of the referendum has related primarily to this application, rather than to the earlier established uses in a compulsory form for constitutional amendments, banking laws, state debts, and certain other matters. The term "referendum" is, therefore, used in ordinary conversation with respect to what is here termed the "optional referendum," rather than with respect to the compulsory referendum, or as applicable to both types.

Initiative

The term "initiative" is employed to designate a pro-

CHAP XIX

posal of legislation by popular petition, coupled with the obligation that such proposal shall be considered by the legislative body or submitted directly to a popular vote. Under present conditions it is not difficult for any one to obtain the introduction of a bill into the legislature. Ordinarily, of course, only members of the legislature may introduce bills; but a member is usually obliging to any one who desires a bill introduced. However, the introduction of a bill in this manner into the legislature involves no obligation that the bill receive serious consideration. The term "initiative" means merely a proposal, but as employed with reference to popular action it means a proposal coupled with the obligation to consider or to submit directly to a popular vote.

Relation of initiative to referendum

As used with reference to popular action, the initiative should perhaps more properly be designated "the initiative and referendum," for the popular initiative is a proposal that may, or does, directly result in a popular vote, or a referendum. President Lowell is correct in distinguishing between the referendum on the one hand as against the initiative on the other, but the distinction should more properly be that between the referendum standing alone, and the initiative coupled with the referendum. The referendum may be employed as an independent institution, but in our political language the term "initiative" carries with it also the implication that the initiative leads to a referendum. The initiative, as a political institution, therefore is not independent, but is rather a part of a mechanism of which the referendum is a supplementary part. In this discussion the term "referendum" will be employed as relating to the referendum standing alone; and the term "initiative" as relating to a popular initiation of measures coupled with the necessity for legislative consideration or popular action upon measures so initiated.

Direct and indirect initiative

The direct initiative is one that proposes a matter and forces a popular vote upon it without an opportunity

for action by the representative legislative body. The indirect initiative, on the other hand, contemplates that the regular legislative body shall first have an opportunity to act upon a proposal presented by popular petition, before a popular vote is had upon the measure so initiated.

DEVELOPMENT OF THE INITIATIVE AND REFERENDUM

Early development of compulsory referendum

The referendum is a much older institution in this country than the initiative. Since the first state constitutions there has been a steady tendency to permit constitutional changes only as the result of a popular vote. There has also been a tendency in state constitutional development to specify certain types of legislation as operative only after a popular vote. Under these constitutional provisions, an active application of the referendum, and primarily of the compulsory referendum, has existed for a number of years. In many states legislative bodies are authorized to submit measures to popular vote without a petition being presented for such action. The referendum therefore exists to a very large extent without reference to the recent movement for the establishment of the initiative and referendum. Between 1901 and 1908 about four hundred constitutional proposals were submitted in the several states; and few of these proposals resulted from the adoption of the newer institution of the initiative and referendum.[1]

More recent movement

Since the adoption of the initiative and referendum by constitutional amendment in South Dakota in 1898, nineteen other states have adopted the initiative and referendum for state-wide measures, or have provided for the application of these institutions. Two states,

[1] Illinois in 1901 and Massachusetts in 1913 adopted by statute a so-called advisory referendum. Under these laws a popular petition might force the submission of a question upon the ballot, but no legal effect resulted from the expression of popular view. See *Massachusetts Constitutional Convention Bulletins*, II, 289, for a discussion of experience in that state.

STATE-WIDE INITIATIVE AND REFERENDUM

STATE	DATE	INITIATIVE FOR STATUTES	INITIATIVE FOR CONSTITUTIONAL AMENDMENTS	REFERENDUM	REMARKS
South Dakota....	1898	5% indirect	None	5%	Slightly restrictive amendment rejected 1914
Utah	1900 (directory); law, 1917	5% indirect 10% direct (majority of counties)	None	10% (majority of counties)	Law enacted in 1917
Oregon	1902; extended 1906	8% direct	8% direct	5%	Restrictive amendment rejected 1912
Nevada	Referendum 1904; I. & R. 1912	10% indirect	10% indirect	10%	
Montana	1906	8% (⅔ of counties) direct	None	5% (⅔ of counties)	
Oklahoma	1907	8% direct	15% direct	5%	Initiated measures require majority of votes at election
Maine	1908	12,000 indirect	None	10,000	
Missouri	1908	8% (⅔ congressional districts) direct	8% (⅔ congressional districts) direct	5% (⅔ congressional districts)	Restrictive amendment rejected 1914

Michigan	1908; extended 1913	8% indirect	10% direct	5%	Immaterial amendment adopted 1918
Arkansas	1910	8% direct	8% direct	5%	Rejected constitution of 1917 would have restricted
Colorado	1910	8% direct	8% direct	5%	Restrictive amendments rejected 1914
California	1911	8% direct 5% indirect	8% direct	5%	Restrictive amendment rejected 1915
New Mexico	1911	None	None	10% ($\frac{3}{4}$ counties)	25% may suspend law. Majority 40% vote at election to reject
Arizona	1911; extended 1914	10% direct	15% direct	5%	Restrictive amendment rejected 1916
Idaho	1912 directory	None	None	None	No law yet enacted
Nebraska	1912; revised 1920	7% (5% in $\frac{2}{3}$ counties) direct	10% (5% in $\frac{2}{3}$ counties) direct	5% to refer; 10% to suspend (5% in $\frac{2}{3}$ counties) direct	Affirmative vote of 35% on laws and amendments
Ohio	1912	3% plus 3% indirect (at least $\frac{1}{2}$ percentage from $\frac{1}{2}$ counties)	10% direct (at least $\frac{1}{2}$ percentage from $\frac{1}{2}$ counties)	6% (at least $\frac{1}{2}$ percentage from $\frac{1}{2}$ counties)	Restrictive amendment rejected 1915

STATE-WIDE INITIATIVE AND REFERENDUM — *Continued*

STATE	DATE	INITIATIVE FOR STATUTES	INITIATIVE FOR CONSTITUTIONAL AMENDMENTS	REFERENDUM	REMARKS
Washington	1912	10% (not over 50,000) direct and indirect	None	6% (not over 30,000)	Total vote must equal ⅓ at election
Mississippi	1914	7,500 direct	7,500 direct	6,000	Proposal submitted and failed, 1912
North Dakota....	1914; revised and extended 1918	10,000 direct	20,000 direct	7,000	30,000 may require special election on emergency referred law
Maryland	1915	None	None	10,000 (not more than ½ from one county or Baltimore)	Referendum only
Massachusetts ...	1918	10 plus 20,000 plus 5,000; 30% vote; indirect	10 plus 25,000; two sessions; 30% vote; indirect.	10 plus 15,000; 10 plus 10,000 for repeal of emergency or other measures; 30% vote	Expressly inapplicable to numerous subjects; not over ¼ signatures from one county

New Mexico and Maryland, have adopted the referendum alone for ordinary legislation. Utah in 1900 adopted a constitutional amendment authorizing the legislature to establish the initiative and referendum for ordinary legislation, but no legislation was enacted for this purpose until 1917. Idaho in 1912 adopted a constitutional amendment authorizing the legislature of that state to establish the initiative and referendum, but up to the present time no such legislation has been enacted. Idaho may therefore be excluded from this list and the number of states having the state-wide initiative and referendum reduced to nineteen. Maryland and New Mexico have only the referendum, the other nineteen states having both the initiative and referendum for state-wide legislation. Of the nineteen states having the initiative and referendum, five do not apply the initiative to constitutional amendments.

The table beginning on page 506 indicates the development of the state-wide initiative and referendum in this country and also something of the character of the plans adopted in the several states.

Constitutional and statutory provisions

In all of the states except Utah and Idaho, and perhaps South Dakota, the constitutional amendments with respect to the initiative and referendum have been self-executing, but have provided that legislation should or might be enacted to carry them into operation. The amendments adopted have in some cases been general in form and have left a large amount of detail to be covered by statutes. Others have themselves dealt with matters of detail, and have left less to statutory regulation. However, in all but two or three of these states legislation has been enacted supplementing the constitutional provisions, and it is necessary in many cases to have this legislation in mind in discussing the operation of the constitutional provisions. There has been a tendency toward greater detail in constitutional provisions, as strikingly illustrated by the Massachusetts constitutional

CHAP. XIX

amendment of 1918. Those interested in the extension of the initiative and referendum have naturally opposed the plan of merely authorizing legislative action for the establishment of these institutions. Their point of view finds support in the fact that the Utah amendment was adopted in 1900, but was not made effective by legislation until 1917, while an amendment adopted by Idaho in 1912 has not yet been put into operation by legislative action.

Local application

The constitutional provisions for the initiative and referendum in a number of cases established these institutions not merely for state but also for local use, or authorized their local application. In states not having constitutional provisions, statutes have in a number of cases adopted a local initiative and referendum, most frequently in connection with commission government and city-manager legislation for cities. A phase of the development of the local initiative and referendum to which attention should be expressly called is the extensive use of so-called "local option" legislation. Under the local option plan, state legislatures adopt a law, general in form, to come into effect in a particular community upon adoption by that community. Such laws frequently provide that submission in a local community may be had by action of the local legislative body, but usually permit submission also upon the basis of a local popular petition. Local option legislation, therefore, in many respects parallels the institution of the initiative and referendum; for it involves in many cases a local petition for the submission of a legislative measure, followed by a local vote to determine whether such measure shall be put into application by that community.

ANALYSIS OF THE INITIATIVE AND REFERENDUM

Varying plans

Plans for the initiative and referendum vary materially in their detail and in the extent to which this

detail is prescribed by constitutional provisions or by legislation. Decisions of the highest courts of the several states must also be read along with the constitutional and statutory provisions for the establishment of these institutions, in order to have a complete picture.[1] The table at page 506 indicates the variations in the size of petitions, distribution of petitions, the requirements of popular voting, and other general matters necessary for an understanding of the institutions in the several states.

Types of initiative

Of the nineteen states having a popular initiative in operation, nine have an indirect initiative. South Dakota adopted the first initiative and referendum plan in this country, and this plan, while indirect in form, is direct in fact. Under the South Dakota plan a popular petition proposes a measure, which the legislature is required to "enact and submit." The legislature has no discretion as to the form in which the measure shall be submitted. In Maine, Nevada, and Michigan a petition proposes a measure to the legislative body, but the legislature must accept or reject without change the measure as it is proposed; although in these states the legislature has authority to submit competing or substitute proposals, with a recommendation that such proposals be adopted by the voters.[2]

Alternative plans

In several states plans have been adopted that give the legislative body a greater degree of discretion under the indirect initiative. In Washington, Utah, and California the petitioners have a choice between the direct and indirect initiative. In Washington a measure initiated by petition goes to the legislature, if the petition is submitted not less than ten days before the legislative session. If the petition is submitted not less than four months before the election, the measure goes directly to

[1] The most up-to-date discussion in some detail of these institutions will be found in *Constitutional Convention Bulletin* No. 2, "The Initiative, Referendum, and Recall," published by the Illinois Legislative Reference Bureau in 1919.

[2] This statement does not apply to constitutional amendments in Michigan, where there is a direct initiative with a larger petition.

CHAP. XIX

a popular vote at the election. Under Utah legislation, a 5 per cent. petition may initiate a proposed measure in the legislature, but a 10 per cent. petition is required to initiate a measure for submission directly to popular vote. Under the Utah plan, if a measure initiated in the legislature by a 5 per cent. petition is not enacted without change, a further 5 per cent. petition is necessary to require submission to a popular vote. A measure may be initiated directly for submission to the voters in California by an 8 per cent. petition, but may be initiated in the legislature by a 5 per cent. petition. In California, if a measure is initiated in the legislature by petition, it must be passed or rejected as presented; and if rejected it goes to a popular vote, with power in the legislature to submit a competing or substitute proposal, as in Maine, Nevada, and Michigan.

Ohio and Massachusetts

Ohio provides for an indirect initiative with respect to laws, and Massachusetts for an indirect initiative both as to laws and constitutional amendments. Under the Ohio plan, a 3 per cent. petition may present the text of a measure to the legislature. If the measure is not passed, or is passed in an amended form, or if no action is taken within four months, an additional 3 per cent. petition may require the submission of the measure either in its original form or with amendments proposed by either house. The Massachusetts plan for an indirect initiative of both laws and constitutional amendments is the most complex initiative and referendum provision yet adopted by any state. The Massachusetts clause contains a number of limitations upon the use of the initiative. Ten petitioners first present a proposed measure to the attorney-general, who, if he thinks proper, makes a certificate that the proposal is not in contravention of any of the limitations upon the use of the initiative. A petition of 20,000 voters may then present the measure to the general court. After legislative consideration, a majority of the first ten petitioners may make corrections

in the proposed law, subject to the approval of the attorney-general, and then an additional petition of 5,000 may require the submission of the measure to a popular vote. The steps upon an initiated constitutional amendment in Massachusetts are still more complex.

Draftsmanship

Under an indirect initiative, which gives the legislative body an opportunity to consider the proposal, there is a distinctly better opportunity for careful draftsmanship. Under the plan which permits a small group to draft a proposal and then, upon obtaining a certain number of signatures to a petition, to force a popular vote directly upon such a proposal, the responsibility for correct draftsmanship lies in those who first draw the proposal. Draftsmanship of laws enacted by representative legislatures is to a large extent defective, and it can not be said that the draftsmanship of initiated laws is materially worse, even in the states that have the direct initiative. This does not mean, however, that the draftsmanship of initiated laws should not be improved. Under the indirect initiative, as adopted in Ohio and Massachusetts, there is an opportunity for legislative consideration and discussion of the defects of a proposed measure, and a possibility of remedying such defects before the measure is submitted to popular vote.

Wisconsin and Illinois proposals

With the indirect initiative and the possibility of amending a proposal before it is submitted to popular vote, there is no great need for a large petition to submit a measure to the legislative body in the first place. This has been recognized by a proposal which failed of approval by the Illinois General Assembly in 1911 and 1913, and also by a proposed constitutional amendment rejected in Wisconsin in 1914. Under the Wisconsin plan it was assumed that if any appreciable number of the people of the state wished to do so, they could obtain the introduction of a measure in the legislature. The measure being introduced in the legislature in the ordinary way, without the pressure of an initiative, a peti-

CHAP. XIX

tion of 8 per cent. of the qualified voters was then permitted to require the submission to the people of such a proposed law, either in the form in which it was originally introduced or with any amendments thereto that might have been proposed in the legislature. Under the proposed Illinois plan, an 8 per cent. popular petition might initiate a matter in the legislature, and, unless the measure so initiated were enacted without change, it was to be submitted to the people at the next general election, unless it should have been placed upon passage and have failed to receive the affirmative vote of at least one fourth of the members elected to each house. A possible combination of the Wisconsin and Illinois plans might proceed upon the assumption that any desired measure can be introduced into the legislature under the present legislative machinery. A measure once introduced, a popular petition could then require the submission of the measure, together with any amendments made in either or both houses of the legislature, provided the measure received the affirmative vote of at least one fourth of the members elected to each house.

Size of petition

The table at page 506 indicates the number of petitioners required to proposed measure by the initiative and to require the reference to popular vote of measures enacted by the legislature. It will be noted that 8 per cent. is the more popular number for the initiative, and 5 per cent. the more popular for the referendum, although there has been a slight tendency to increase this percentage, and also some tendency in recent years to require a specific number of petitioners rather than a percentage of voters. The state of Washington combines these two methods by prescribing a certain percentage, but also that the total number of signatures required shall not exceed a specific number. In the states where percentages are required, some difference results through the basis taken for the percentage. Upon a percentage basis, the introduction of woman suffrage has

materially increased the number of petitioners required. The introduction of woman suffrage in Oregon has probably been one of the reasons for a lesser degree of use of the initiative and referendum since 1912. The difficulty in obtaining a petition is, of course, greatly increased with an increase in the number of petitioners. It is also true that a certain fixed percentage of the voters of the state is more difficult to obtain in a populous state than in a state of smaller population.

Geographical distribution of petitioners

The requirement of a certain geographical distribution of petitioners is common. This is proper in order that petitions should not merely represent a single section of the state; although serious difficulty is presented by a requirement such as that in New Mexico, that the percentage for a referendum petition shall be obtained from three fourths of the counties of the state.

Fraud in petitions

Fraud in the preparation of petitions is likely to occur, and for this reason there has been a tendency toward greater detail, both in constitutional provisions and in legislation, with respect to the preparation and verification of petitions. Provision is now made in a number of states for careful verification. The decision as to the validity of petitions is usually committed to a state officer, and in some cases express provision is made for judicial review of his decision. In Massachusetts a constitutional provision expressly forbids the circulation of petitions by corporations or co-partnerships, and provision is made for the licensing of persons to circulate petitions. Utah by legislation requires an application for blanks by five sponsors with the payment of a fee, and that signatures be made in the presence of and with certification by a notary public; also each signature is required to be checked by the county clerk with the registration lists. If too many safeguards are thrown around the preparation of petitions, the use of the initiative and referendum will be made ineffective. For this reason, the North Dakota constitution goes to the other

CHAP. XIX

extreme and provides that no law shall limit the number of copies of the petition to be circulated or the payment of compensation for the circulation of petitions.

Influence of size of petition

Large petitions do not necessarily represent a strong sentiment in the community in favor of a measure. A small petition prepared under careful safeguards is likely to represent much more of an actual public sentiment than a large petition obtained through the hiring of professional "signature-getters." A plan adopted in Washington, which permits petitions to be left with registration officers for signature, has distinct merit, though such a plan alone can not be relied upon, if a large petition is necessary. If the initiative is indirect, with the possibility of amending the proposal before its submission, a small petition for the original presentation of the measure would probably meet all needs.

Effect of type of initiative

Constitutional provisions properly require a smaller petition for the referendum than for the initiative, although there is a good deal to be said in favor of a small petition for the indirect initiative. The direct initiative is not a popular proposal of legislation, but the right of a small percentage of voters, through the employment of some time and expense, to have a popular vote upon a measure that they submit. There is a counter-right of the people to have only issues of importance submitted to them. In this respect the indirect initiative presents a different problem from the direct initiative.

Limitations on the initiative

Constitutional provisions contain a number of specific limitations upon the use of the initiative. Several states forbid the proposal by popular petition of a measure within a certain time after it has once been rejected. In Nebraska the same measure may not be submitted oftener than once in three years. In Oklahoma a measure, once rejected, is not to be again submitted within three years by less than a 25 per cent. petition. Ohio and Massa-

chusetts have express limitations upon the use of the initiative for certain purposes, as also has Montana.

Constitutional amendments

A number of states do not permit the popular initiation of constitutional amendments.[1] Others provide for the use of the initiative upon constitutional amendments in the same manner as upon statutes.[2] In seven states distinctions are made between the popular initiation of constitutional amendment and of statutes. This is accomplished in Oklahoma, Arizona, Nebraska, and North Dakota by requiring a larger petition for constitutional amendments. In Michigan and Ohio a direct initiative is the method of proposing constitutional amendments, and a larger petition is required for this purpose. Massachusetts provides not only for a larger petition but also for a much more complex procedure in the proposal of constitutional amendments than in the proposal of statutes.

Limitations on referendum

Limitations are found in a number of states upon the application of the referendum to laws for the support of the state government and its existing public institutions. In Massachusetts there is a detailed series of subjects upon which the referendum may not be used. The Utah constitution exempts from the referendum laws passed by a two-thirds vote of the members elected to each house. The most common exemption from the referendum found in state constitutions is that of laws necessary for the immediate preservation of the public peace, health, and safety. In virtually all of the states the referendum is applicable to any item, section, or part of an act in the same manner as to complete acts, although little use seems likely to be made of the referendum upon parts of acts.

Emergency measures

The general plan for the application of the referendum is to provide that laws enacted by the legislature

[1] South Dakota, Utah, Montana, Maine, and Washington.

[2] This statement applies to Oregon, Nevada, Missouri, Arkansas, Colorado, and Mississippi. California virtually belongs in this class.

CHAP. XIX

shall not come into effect until a certain time after the legislative adjournment. In this interim referendum petitions may be filed, and the effect of such a petition is in most states to suspend the application of the act until a popular vote is had. The most difficult problem involved in the referendum has been that of measures for which immediate application is necessary, without the possibility of suspending the legislation and waiting for the possible filing of a referendum petition to be followed by a popular vote. A constitutional provision that laws shall be exempted that are necessary for the immediate preservation of the public peace, health, and safety is likely to be abused, particularly if the determination of such necessity is purely for legislative action. In six sessions of the South Dakota legislature, running from 1899 to 1909, 1,251 acts were passed, and of these 537 contained emergency clauses.[1]

Limitations upon declarations of emergency

Because of possible legislative abuses in the declaration of emergencies, constitutional provisions have sought to place certain definite limits upon declarations of this character. A number of states require a vote of three fifths, two thirds, or three fourths of the legislative membership. Arizona requires a two-thirds vote if the governor approves, and a three-fourths vote if he disapproves; and a similar provision is found in Oklahoma. The Massachusetts amendment of 1918 contains still further limitations upon the declarations of emergencies. In the application of the referendum there seems some tendency to apply the principle that a law shall not be suspended by referendum petition, but shall remain in effect until voted upon by the people, an adverse popular vote then serving as a repeal. Such a principle is expressly recognized by Montana, Nebraska, New Mexico, and North Dakota. The New Mexico constitution provides for the repeal of a law by popular vote, upon a 10 per cent. petition, but requires a 25 per cent. petition to suspend the law until the vote is taken.

[1] Lowell, *Public Opinion and Popular Government*, p. 175.

The Massachusetts constitution authorizes the repeal of an emergency or other law on referendum petition.

Referendum to repeal a law

The plan of providing for the repeal of a law upon referendum vote unless a large petition is obtained for its immediate suspension has two distinct advantages. It does away with a situation under which legislative bodies must declare emergencies in order to give immediate application to a law, and may in fact declare emergencies where no real emergency exists. Where a state legislature has final discretion to declare an emergency, and does so, this declaration defeats a referendum altogether; whereas if the referendum applies to repeal such a law, application to the immediate emergency is made, and popular action finally determines the result. Such an arrangement also avoids a difficulty that has arisen in a number of states through the filing of a referendum petition merely as a means of delaying the operation of a legislative act, with little or no idea that the measure would finally be rejected by the people. Popular voting upon measures usually takes place at the next general election, about a year and a half after the adjournment of the legislature, and a delay of this length may be strongly desired by those whom legislation affects. Plans of bringing all laws into operation at once, subject merely to a repeal by means of the referendum, would be open to some abuse, in that the result sought by a measure may sometimes be accomplished before the possibility of such repeal. The danger would be done in such a case before popular action could be had. This situation may perhaps be met by a constitutional provision to the effect that an ordinary referendum petition shall not suspend a measure, but that a larger petition shall be required for this purpose. This is the plan employed in the New Mexico and Montana constitutions.

Two law-making organizations

The problem of emergency legislation has been further complicated by judicial decisions. The courts of a number of states have properly taken the view that by adoption of the direct initiative and referendum the

CHAP. XIX

legislative department of the state is divided into two separate and distinct law-making bodies. The representative legislature of the state remains as the general body for law-making purposes; but under the initiative as adopted in Oregon an 8 per cent. petition, supplemented by a popular vote, may legislate in complete independence of the representative legislature.[1] In view of the fact that the initiative and referendum set up a distinct law-making organization in many states, courts in some states have taken the view that a legislative declaration that an emergency exists is not final, but is subject to judicial review.[2]

Judicial determination of emergency

The fact that some state courts reserve to themselves the final decision as to whether a legislative declaration of an emergency is proper merely complicates a difficult situation. Judicial review means, of course, that a legislature may not abuse its authority, as was done for a number of years in South Dakota; but it means also that in every case of doubt a judicial determination must be had before the status of the law can be determined. Such judicial determination will ordinarily be sought only in a case where there is some doubt as to whether the law is or is not immediately necessary. It is wise, if possible, to avoid not only the abuses likely to result from improper legislative declaration of emergency, but also the difficulty and delay entailed by the necessity of obtaining judicial decisions upon each question. This result may perhaps be accomplished if the filing of a referendum petition serves as a means of obtaining a popular vote upon the repeal of legislation, but with provision that a larger petition may, under certain conditions, suspend at once the application of a measure. The larger petition would be difficult to obtain, and

[1] See Straw *v.* Harris, 54 Oregon 424 (1909), p. 430.

[2] The rule that the legislative decision is final exists in Oregon, Arkansas, Colorado, Oklahoma, and Ohio. The contrary view exists in Washington, South Dakota, Michigan, and California. A review of the recent cases upon this subject will be found in State *v.* Smith, 133 N. E. 457 (Ohio, 1921).

could not be employed except in case of obvious abuse of legislative power.

Submission of measures without petition

A number of state constitutions authorize a referendum upon popular petition, and also expressly provide that the legislative body itself may submit its measures to popular vote. If a measure may be submitted to popular vote as the result of a relatively small petition, it seems unnecessary to permit the legislative bodies to submit their own measures. It is always possible for the legislative body to shift responsibility by submitting a measure directly to the people; and if the same result may be obtained by a small popular petition, this possibility of shifting responsibility should not exist.

Ballot titles

The form in which a measure is submitted determines to a large extent the intelligence with which the voter may act upon it. For this reason, constitutional and statutory provisions in a number of states have attempted to obtain a definite degree of publicity upon measures, and to make sure that the titles of measures shall be such as not to mislead the voters. The Massachusetts constitutional amendment of 1918 prescribes the general form of ballot, and provides that the proposed amendment or proposed law "shall be described on the ballots by a description to be determined by the attorney-general, subject to such provision as may be made by law." Constitutional provisions regarding ballot titles also exist in North Dakota and Maryland. More detailed provisions as to ballot titles are found in statutes regarding the initiative and referendum. In a number of states such statutes provide for the preparation and approval of titles by the attorney-general, with an appeal to the courts if there is dissatisfaction with his action.

Publicity pamphlets

Four constitutions expressly provide for publicity pamphlets in connection with the initiative and referendum. The term "publicity pamphlet" has come to be used with respect to pamphlets prepared under official supervision, containing the texts of measures to be

CHAP. XIX

submitted to popular vote, together with arguments for and against such measures. Where such publicity pamphlets are required by constitutions or statutes, there is also a requirement that copies be sent to the voters of the state. A number of states do not have constitutional provisions for such publicity pamphlets, but have detailed statutory provisions for this purpose. The statutes of Oregon and California sufficiently indicate the types of legislation in this respect. The Oregon publicity pamphlet may contain arguments for or against measures, prepared and presented by private initiative, subject to the condition that the state shall receive payment for the publication of arguments in its publicity pamphlet. Under the Oregon plan, no arguments appear for or against a measure, unless private individuals or corporations are sufficiently interested to prepare and pay for such arguments. This means that questions are often not argued at all, or have arguments merely upon one side. Under the California plan, however, arguments both for and against each proposed measure are officially prepared and appear in the publicity pamphlet. The California plan, which places the preparation of arguments under the control of official bodies or members of official bodies, may often lead to arguments that are not quite so spontaneous as those prepared under the Oregon plan, but it has the advantage of making sure that both sides of each question will be argued.

Competing measures

With respect to the possibility of intelligent popular action upon measures submitted through the initiative and referendum, an element of importance is the simplicity or complexity of the proposals submitted. Any plan that permits competing measures to be submitted upon the same issue complicates the question upon which the voter must decide. Competing measures upon the same question are expressly authorized by constitutional clauses which provide that if a measure initiated by

popular petition is not enacted by the legislature without change it shall be submitted to a popular vote, but that the legislature may submit a competing or substitute measure.[1] The provisions for indirect initiative in Washington also expressly contemplate competing measures, and the Massachusetts constitutional amendment of 1918 has a provision for competing and conflicting measures. The Washington constitution provides that "when conflicting measures are submitted to the people, the ballot shall be so printed that a voter can vote separately by making one cross for each two preferences, first as between either measure and neither, and second as between one and the other. If a majority of those voting on the first issue is for neither, both fail; but in that case the votes for the second issue shall nevertheless be carefully counted and made public. If a majority voting on the first issue is for either, then the measure receiving a majority of the votes on the second issue shall be law." In Maine express provision for competing measures requires that they shall be submitted in such a manner that either may be chosen or both rejected. Massachusetts provides "for grouping and designating upon the ballot as conflicting measures or as alternative measures, only one of which is to be adopted, any two or more constitutional amendments or laws which have been or may be passed, or qualified for submission to the people at any one election."

Conflicting measures

The question of conflict arises also when measures are not in form alternative or competing. In states that have no provisions for alternative measures, proposals may be submitted that are actually alternative. This was true of the Oregon proposals regarding fisheries in 1908, the adoption of both of which actually prevented any fishing at all, although each proposal taken separately sought to prevent a particular method of fishing. Measures that actually conflict with each other either in

[1] Maine, Nevada, and Michigan.

CHAP. XIX

whole or in part may often be submitted; and it is to meet this situation that legislation has been enacted in Oregon providing that to the extent of such conflict the measure obtaining the highest vote shall prevail. Similar legislation has been enacted in several other states, and provisions to the same effect are found in some constitutions. The Utah statute provides that in case of conflict the governor shall proclaim the measure receiving the highest number of votes, but permits an appeal to the supreme court as to whether there is a conflict.

Ohio experience

An interesting illustration of the possibility of conflict, in measures independently submitted, is afforded by two Ohio constitutional amendments of 1918. A proposed initiative amendment provided for the classification of property for taxation, and a proposed legislative amendment for the avoidance of double taxation on real estate. Both amendments necessarily dealt with the same section of the constitution. The legislative amendment, which received the larger affirmative vote, under the Ohio rule destroyed the broader amendment proposed by initiative petition, which also received a majority of the votes cast upon it.

Popular vote

The table at page 506 indicates the popular votes required for the adoption of an initiated measure, and for the rejection of a legislative measure referred to popular vote. Most of the state constitutions merely require a majority of those voting upon the question, but the New Mexico referendum provision requires disapproval of a referred measure by a majority equal to not less than 40 per cent. of the total number of votes cast at a general election. In Nebraska an initiated measure, in order to be adopted, must receive the approval of a majority of the votes cast thereon and 35 per cent. of the total vote cast at the election. The Idaho constitutional provision, which has never been made effec-

tive by legislation, requires that an initiated measure shall have the approval of a majority of the aggregate vote cast for governor at the general election at which the measure is submitted. Oklahoma requires that an initiated measure shall be approved by a majority of the votes cast at the election at which the measure is submitted. The Massachusetts constitutional amendment of 1918 contains the most detailed provisions with respect to this matter. An amendment to the constitution proposed by the legislature is adopted if approved by a majority of those voting thereon; an initiated amendment, or a legislative substitute for such an amendment, must be approved by at least 30 per cent. of the voters at a state election, as must also an initiated law. A legislative act referred on petition, or an emergency law sought to be repealed by the referendum, can be rejected only if the negative vote is 30 per cent. or more of the total number of ballots cast at a state election.

Value of requirements

A mere majority of those voting upon the question will in many cases not express a real public sentiment. In Colorado a number of important measures have been adopted when less than 30 per cent. of the voters in the election expressed themselves either way. But to require a majority of those voting at a general election makes the use of a referendum virtually unworkable, because some voters will always express themselves upon candidates without marking a ballot upon measures. There is much to be said in favor of such a plan as that adopted in Nebraska, which requires a total affirmative vote of 35 per cent. in order to adopt an initiated measure; and a similar percentage may well be required to reject a referred legislative act. The Massachusetts plan is not an unwise one, if the initiative and referendum are to be adopted. Reference should again be made in this connection to the influence of ballot forms upon pop-

CHAP. XIX

ular voting. If measures are submitted upon a ballot separate from that for candidates, it is possible in most cases to obtain a larger vote upon them.

RESULTS OF POPULAR VOTING UNDER THE INITIATIVE AND REFERENDUM

Conditions limiting consideration of results

The referendum was actually used to a great extent in the states before the adoption of the initiative and referendum in their more recent forms. The initiative and referendum have added to popular voting; in the states that have adopted these broader institutions, the number of measures submitted to popular vote has been materially increased. In considering results in the states that have adopted either the referendum or the initiative and referendum, it is impracticable to distinguish the measures that might have been submitted without these institutions from those that were actually submitted as a result of these institutions. It is, of course, possible to determine what measures have been popularly enacted, and what legislative measures have been submitted, as a result of popular petition; but popular voting upon measures proposed by the legislative body goes on side by side with the popular voting that results from petition. The two institutions necessarily influence each other; and the voter must express himself upon both types of questions in the same election. It must also be borne in mind that the states have adopted these institutions at different times; that the referendum alone exists in Maryland and New Mexico; and that Maine, Montana, South Dakota, Utah, and Washington have the initiative and referendum upon ordinary legislation, but no initiative upon constitutional measures.

Number of popular submissions

From the years 1900 to 1914 there was a steady increase in the number of measures submitted through the initiative and referendum. The measures submitted to popular vote ordinarily come in even years, which are

the years for general elections, and follow the legislative sessions, which in most states occur in odd years. Even years will have relatively heavy submissions of measures, and the odd years relatively slight submissions or none at all. In estimating the number of popular submissions in the states having the initiative and referendum, all measures submitted to popular vote after the date of the adoption of these institutions in the particular state are included. Counted in this way, 717 measures were submitted between the years 1900 and 1919, of which 307 were adopted. The largest number submitted in any one year was 188, in 1914. The table on page 528 indicates the total number of measures submitted during the whole period within which the initiative and referendum have been operating in each state.

It will readily be seen that Arizona, California, Colorado, Missouri, Oklahoma, Oregon, and South Dakota are the states that have employed the popular submission of measures most vigorously, and that Oregon has the largest number of such measures. The largest number of measures submitted in any one year, *i.e.*, forty-seven, was submitted in California in 1914; and the next largest, thirty-seven, was submitted in Oregon in 1912.

Frequency of submissions before adopting initiative and referendum

An analysis of different types of measures is of interest. All of these states had compulsory referenda upon constitutional amendments before they adopted the initiative and referendum. Thus in California numerous constitutional amendments were submitted to the people every two years, before the initiative and referendum were adopted in 1911, and the first measures under these institutions were submitted in 1912. In 1911 the legislature submitted twenty-three proposed constitutional amendments; and in each of the years 1906 and 1908 it submitted fourteen measures. The fact of this frequent submission of constitutional amendments in California before the adoption of the initiative and referendum must be borne in mind in considering the very

TOTAL NUMBER OF MEASURES SUBMITTED

STATE	Years of Submissions	Total Submissions	CONSTITUTIONAL AMENDMENTS				LAWS				
			Proposed by Legislature	Proposed by Initiative	Total Amendments Submitted	Total Adopted	Proposed by Initiative	Referred by Legislature	Referred on Petition	Total Laws Submitted	Total Adopted
Arizona	1912–18	54	6	15	21	11	18	1	14	33	22
Arkansas	1912–18	19	6	5	11	6	7	.....	1	8	3
California	1912–18	98	51	15	66	29	15	8	9	32	12
Colorado	1912–18	61	8	17	25	8	24	1	11	36	12
Maine	1908–18	17	11	.....	11	6	1	.....	5	6	3
Maryland	1916–18	2	2	.....	2	2	.....	.....	.....	.....	.....
Michigan	1914–18	16	12	4	16	10	.....	.....	.....	.....	.....
Mississippi	1918	2	1	1	2	.....	.....	.....	.....	.....	.....
Missouri	1910–18	48	29	14	43	1	.....	1	4	5	1
Montana	1908–18	23	9	.....	9	5	9	4	1	14	9
Nebraska	1914–18	10	3	4	7	2	.....	1	2	3	1
Nevada	1908–18	12	11	.....	11	11	.....	.....	1	1	1
New Mexico	1912–18	8	7	.....	7	5	.....	1	.....	1	1
North Dakota	1916–18	14	5	7	12	12	.....	.....	2	2	2
Ohio	1913–18	21	6	12	18	6	.....	.....	3	3	.....
Oklahoma	1908–18	45	10	23	33	12	6	2	4	12	7
Oregon	1904–19	170	37	43	80	31	62	12	16	90	35
South Dakota	1900–18	73	50	.....	50	27	9	.....	14	23	8
Utah	1918	3	3	.....	3	3	.....	.....	.....	.....	.....
Washington	1914–18	21	2	.....	2	.....	9	3	7	19	3
		717	269	160	429	187	160	34	94	288	120

large total of submissions since the adoption of these institutions.

Extent of compulsory referendum

Of the 717 measures submitted to a popular vote in these states, 429 were proposed constitutional amendments, upon which the referendum is compulsory. Of these 429 proposed amendments, 269 were submitted by legislatures and 160 by initiative petition. A large number of these proposed amendments dealt with matters of relatively small importance; and popular submission in these cases was made necessary by the fact that if the changes were to be made at all they must be made by constitutional amendment. Out of every 7 of the proposals submitted to the people of these states 4 were submitted in large part because of the fact that detailed state constitutions made it necessary to employ a compulsory, rather than an optional, referendum. A large number of the constitutional amendments proposed by legislative action related to matters upon which a popular vote would probably not have been demanded had the necessity for such a vote depended upon popular petition. Forty-seven measures were submitted to a vote of the people of California in 1914; but, of these 47, 30 were proposed constitutional amendments, and 22 of these proposed amendments were submitted by the legislature. The optional referendum therefore applied to but 17 of the 47 measures. In the Oregon election of 1910, 32 measures were submitted to the popular vote, of which 14 were constitutional amendments; and of the 37 measures submitted in 1912 14 were proposed constitutional amendments.

Voting occasioned by petition

Of the 717 measures submitted to a popular vote, 160 were constitutional amendments proposed by popular initiative, and 160 were laws proposed by popular initiative; 320, or three out of seven of the measures, were initiated by popular petition; 94 laws were referred on the basis of popular petition, so that they may properly be added to the total of measures upon which popular

CHAP. XIX

petition forced a vote. Virtually four out of seven of these measures were therefore submitted as a result of popular action. The remaining 303 measures were submitted as a result of legislative action, and 34 of these were laws referred to the people by legislatures themselves, without waiting for a demand by popular petition.

Relative use of optional and compulsory referendum

Summing up the situation as between the optional and compulsory referendum, it may be said that 429 proposals voted upon in these states were constitutional amendments as to which a popular vote was compulsory. From the point of view of the voters, the 34 measures referred by legislatures to a popular vote were also compulsory, although the legislatures did not have to submit them in order to bring the measures into effect.

Extent to which voters act upon measures

The amount of popular voting upon measures varies between state and state, and between election and election. In Arizona the popular vote upon measures in the elections from 1912 to 1916 represented a fair proportion of the total number of those voting in the general elections; although in 1918 there was a distinct reduction in the popular vote upon measures, and upon several measures the popular vote fell below 50 per cent. In Oregon, where the greatest number of measures have been submitted, the proportion of the vote upon measures to the total vote at elections has, on the whole, been large. For the years 1904 to 1919 the average proportion upon all measures was well over 70 per cent., although there was a slump in popular voting upon measures in 1918. In some cases in Oregon, measures have been submitted at special elections called for that purpose, and the total vote at the election and upon measures is in such cases, of course, substantially identical. In Arkansas, South Dakota, and Washington the vote upon measures has compared favorably with that in Oregon, the average in Washington being about 70 per cent. of the total vote at the election. In North Dakota, Nebraska, Ohio, and Oklahoma the popular vote upon measures has been a

fair one. In Michigan the popular vote upon sixteen measures between 1914 and 1918 averaged over 85 per cent. of the total vote for candidates at the same election.

Missouri and California

In each of the Missouri elections of 1910, 1912, and 1914 there was an important issue that attracted the attention of the voters, and in these years voting upon measures averaged well over 70 per cent. of the total vote at the election. This vote was in large part due to issues of taxation, liquor, and woman suffrage; and in each of these elections there was a campaign to have the voters vote "No" upon all measures, so that they would be surer to vote "No" upon the measures as to which there was the greatest controversy. The popular voting upon measures in California has been uneven. In some elections a good proportion of the electors have voted upon measures, but there have been cases where the total vote fell under 50 per cent. of the total vote in the election.

Colorado

Colorado makes the worst showing as to popular votes. At the Colorado election of 1912, 32 measures were submitted to popular vote. Of these, but 1 received a vote that was over 70 per cent. of that cast in the general election. Only 4 measures (including that which received over 70 per cent.) received over 50 per cent. of the total vote at the election, and 12 had either 30 per cent. or less of the total vote cast at the election. Of the 16 measures submitted in 1914, 1 had 95 per cent., 3 had above 60 per cent., 6 above 50 per cent., and all of the other measures had 50 per cent. or less of the total vote at the election. Upon the 8 measures submitted in 1916 a better showing was made, 2 measures having 81 per cent. of the total vote, and 4 others having a total vote exceeding 50 per cent. On the 5 measures submitted in 1918, almost an equally good showing was made.

Results of percentage requirements

In popular voting the results show that a measure can not readily be adopted under a plan that requires an

CHAP. XIX

affirmative vote equal to a majority of the total vote in the general election. A requirement of 35 per cent. appears to make no great difficulty.

Proportion of measures adopted

Little conclusion can be drawn from the proportion between the number of measures adopted and rejected by popular vote. The table given below clearly indicates that the people have not been inclined to approve all of the measures submitted to them:

	SUBMITTED	ADOPTED	PROPORTION
Amendments proposed by legislature	269	129	47.95
Amendments proposed by initiative	160	58	36.25
Laws referred by legislature	34	18	52.94
Laws proposed by initiative	160	62	38.75
Laws referred on petition	94	40	42.55
Total	717	307	42.81

The elections of 1910, 1912, 1914, and 1916 showed a distinct conservatism upon the part of the electors.

Laws referred by petition

Laws submitted on petition are normally referred because of some strong opposition justifying the opponents of legislation in going to the trouble and expense of preparing a petition. The real test of the referendum in this case, therefore, as far as the purpose to be accomplished is concerned, is the proportion of rejections rather than that of adoptions. Tested in this manner, the referendum on petition has accomplished its purpose effectively, having rejected 57.45 per cent. of the measures so submitted, whereas the initiative has obtained the adoption of less than 40 per cent. of its proposals.

Legislative and initiative proposals

Laws referred by the legislature have the highest proportion of adoptions, and this is naturally to be expected in view of the fact that in these cases the legislature was either shifting its own responsibility to the people or was submitting a measure for which it supposed a distinct popular sentiment existed. The smallest pro-

portions of adoptions are naturally for amendments proposed by the initiative and laws proposed by the initiative. Such proposals are, in effect, appeals by a small proportion of the population for the approval of their measures; and it is to be expected that measures proposed by the people's official representatives should have more weight than such appeals.

Constitutional amendments proposed by legislative action

With respect to amendments proposed by the legislature, the adoptions and rejections just about balance each other, and this situation is not very distinctly different from that in the states that do not have the initiative and referendum. For the country as a whole, during the period from 1901 to 1919, some 1,500 constitutional amendments were submitted to the people, of which about 900 were adopted. For the country as a whole, the popular action upon amendments is therefore somewhat more favorable than upon the amendments proposed by the legislatures in the states having the initiative and referendum. However, the lower percentage of adoptions in the states here under discussion has the effect of lowering the average for the country as a whole.

EFFECTIVENESS OF THE INITIATIVE AND REFERENDUM AS INSTRUMENTS OF POPULAR GOVERNMENT

Relation to representative legislature

The initiative and referendum are not in any detailed way substitutes for the ordinary processes of legislation, although several elections (separately analyzed) would seem to indicate that this might be the case. In South Dakota, between the years 1899 and 1917, 2,573 laws were passed, whereas 73 acts and constitutional amendments were submitted to a popular vote. Of these, 50 were proposed constitutional amendments, leaving but 23 submissions of laws, and of the laws submitted 8 were adopted. For the state of Oregon, between the years 1904 and 1919, 2,654 laws were passed by the legislature.

CHAP. XIX

can express a real judgment. The plan employed in Massachusetts and Nebraska of requiring that the affirmative vote for a measure be equal to 30 or 35 per cent. of the total vote at an election is proper and desirable in order to make sure that a real popular judgment is expressed. With such a requirement, questions that do not arouse a distinct popular interest will not be submitted, because their approval can not be obtained.

Repeated submissions

President Lowell also criticizes the initiative and referendum on the ground that "if a popular vote expresses a real opinion, an enduring opinion, of the electorate, it ought to be accepted as final until such time as the people may reasonably be supposed to have had good ground for changing their convictions. It is hardly wise to overburden the people by enlarging the list of measures they must decide with questions needlessly repeated."[1] Some constitutions have very properly forbidden the immediate resubmission of a question that has been rejected by popular action. However, both in legislative bodies and in popular voting, measures make their way gradually. In legislation and popular action a matter several times rejected may finally come to be adopted, and properly adopted. The issue of woman suffrage was submitted to the voters in a number of successive elections in the state of Oregon before it was finally approved in 1912. It is true that a submission for a series of elections every two years may overburden the voter, but such submission may be necessary in order to obtain the final expression of popular will through the referendum. In legislative action and popular voting, as in many other matters of life, an issue that is consistently urged is apt to win in the long run if it has merit.

Influence upon legislatures

Although the initiative and referendum have not replaced representative bodies, they seem to have had little, if any, influence in making these bodies better or

[1] Lowell, *Public Opinion and Popular Government*, p. 217.

worse. Representative legislatures are capable of material improvement. It is doubtful whether the initiative and referendum will bring such improvement. It is also doubtful whether they have done, or are apt to do, a great deal toward reducing or destroying such responsibility as representative legislatures now possess.

Constitutions and statutes

As adopted in a number of states, the initiative and referendum have tended to destroy the distinction between constitutions and statutes. In the states that permit the initiative and referendum to propose and adopt constitutional amendments in precisely the same manner as for the proposal and adoption of ordinary laws, constitutional amendments are in their formal aspects placed upon the same basis as ordinary legislation.[1] The constitutional referendum already existed before the adoption of the referendum for ordinary legislation; but, even with the initiative and referendum for ordinary legislation, it is possible to continue a formal distinction between constitutions and statutes. Votes under the compulsory referendum have steadily increased, even before the adoption of the initiative and referendum; and this increase has taken place primarily as a result of the increased detail in state constitutions. The tendency away from a sharp distinction in subject matter between constitutions and statutes began before the tendency to do away with the distinction in the form of enacting the two types of legislation. The briefer and less detailed a constitution is, the less frequently will amendments be needed, and the more important in fact such amendments are likely to be—though even a brief constitution will necessarily contain some matters requiring change and should not be unduly difficult to amend.

Details in constitutions

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CHAP. XIX

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CHAP. XIX

details, two steps must be taken in order to establish the new policy: (1) a proposed amendment to the constitution must first be submitted to the people; (2) the way is then, and only then, open for legislative action, or for the use of the initiative to propose legislation. Placing details in the constitution multiplies by two the measures that may be submitted to the popular vote in a state having the initiative and referendum, and at the same time makes necessary two steps in place of one in order to obtain a desired reform. In states that do not have the initiative and referendum, detailed constitutions may force more numerous popular votes than actually take place in many of the states having these institutions. Louisiana and South Carolina illustrate this statement. At the November election of 1920, twenty-seven constitutional amendments altering municipal debt limits were submitted to the people of South Carolina, all of which were adopted by small popular votes. Such action can not be called an expression of popular opinion.

Political parties

There has been some discussion of the relationship between the initiative and referendum and the responsibility of political parties. The adoption of these institutions has not reduced the responsibility of political parties for the conduct of state government, because parties were already irresponsible. The introduction of the initiative and referendum has had little bearing upon this matter, one way or the other. It is desirable, however, that political parties be held to a greater degree of responsibility for the conduct of government, and no aid in the development of such greater responsibility has come from the introduction of these institutions. The practical mind of the American politician has not yet connected the initiative and referendum with his party responsibility.

Value of these institutions

The initiative and referendum have aided to some extent in bringing about needed new legislation and in the checking of legislative abuses. But their effect may

be exaggerated. The initiative and referendum were introduced in California in 1911, as the result of a revolt against political abuses. It was the revolt against such abuses that brought about a change in California politics, rather than the initiative and referendum, which was simply one of the results of that revolt. So far as initiated and referred measures are concerned, it is probable that some legislation has been obtained more promptly than it would have been obtained through representative legislatures. It is also probably true that in some cases representative legislatures have enacted laws that they would not have enacted but for the alternative method of legislation. It is also true in some cases that legislatures have failed to take certain action because of the fear of a popular vote. Precise results are incapable of measurement, and these institutions are as yet too young for a final judgment as to their importance in popular government. Clearly they have proved neither a panacea for all political ills nor a substitute for representative government. As in most cases of political reform, they have justified neither the hopes of their friends nor the prophecies of their enemies. The initiative and referendum constitute parts of a radical program. But the results of the referendum are conservative, and the results of the initiative can not be termed radical.

Future success

The future success of the initiative and referendum depends upon a limitation of the type and the number of questions submitted. This limitation can not be altogether accomplished by constitutions or by statutes. No one objected to the compulsory referendum, which was in use before the general movement for the initiative and referendum, and which is perhaps most open to objection. Compulsory voting on immaterial changes in constitutions or in laws should be unnecessary. Constitutional provisions that require popular voting to repeal laws enacted by the referendum are undesirable. The

CHAP. XIX

initiative and referendum have added to the already existing mass of popular voting. There must be a reduction of such voting if the voter is to exercise his powers effectively. This can be accomplished in several ways. It is possible to reduce to a great extent compulsory referenda, and one means of doing this is to reduce the detail in state constitutions. It is now unnecessary to require a referendum upon banking legislation. Fifty years ago such legislation may have needed the check of popular approval, but this is no longer true. It is unnecessary and undesirable to permit a legislative body to shift responsibility by submitting measures at its own will. The indirect initiative involves the possibility of legislative deliberation and action before the measures shall be submitted to the people, and its use would probably avoid a large amount of popular voting.

THE RECALL

Extent to which it applies

The recall has been properly defined as "a special election to determine whether an official shall be superseded before the ordinary expiration of his term."[1] The recall of public officers was adopted by Oregon in 1908, but first became an issue of distinct popular interest when it was placed in the proposed Arizona constitution. Congress required that the provision for the recall of officers in the proposed constitution be amended so as to exclude judges, before that state should be admitted into the union, and such an amendment was made. Immediately after admission, however, the state replaced in its constitution the provision with respect to the recall of judges. The following table indicates the development of the recall in the American states and the extent to which it applies to judicial officers:

[1] "Oregonian," February 24, 1913, quoted in Barnett, *The Operation of the Initiative, Referendum, and Recall in Oregon*, p. 191.

RECALL

STATE	DATE	TO WHOM APPLICABLE	PETITION
Oregon	1908	"Every public officer"	25%
California ...	1911	"Every elective public officer"	12% from at least 5 counties for state officer; 20% for local officer
Arizona	1911, 1912	Public officers holding elective office	25%
Colorado	1912	Elective officers	25%
Idaho	1912 directory	Not to apply to judicial officers	No law yet enacted
Nevada	1912	Every public officer	25%
Washington ..	1912	Except judges	25% and 35%
Michigan	1913	Except judges	25%
Kansas	1914	Every public officer holding either by election or appointment	10% 15% 25%
Louisiana	1914	Except judges	25%
North Dakota..	1920	Includes judges	30%

The recall was rejected in Wisconsin and Minnesota in 1914. In Arkansas a recall amendment was adopted by popular vote in 1912, but was declared invalid by the state supreme court, on the ground that the number of constitutional amendments submitted at the election of 1912 exceeded that permitted by the constitution. Constitutional provisions that have been adopted with respect to the recall relate to local as well as to state officers. In addition to the constitutional provisions, a number of states have statutory provisions applying the recall to local officers. Such provisions are common in legislation regarding city government by commission and under the commission-manager plan.

CHAP. XIX

Types of recall

Constitutional and statutory provisions for the recall ordinarily provide that a recall election shall not be held within a certain time after the election of an officer; and that if the officer is retained in office by such an election, no other election shall be held within a specified time. Under the plans in use, proposals for a recall may be submitted in one of two ways. A petition for a recall may be used to force a new election, in which the officer sought to be recalled becomes merely a candidate for reëlection. Such a plan does not raise squarely the issue of the recall of the officer, but rather presents a political issue as to whether he shall be reëlected for the remainder of his term, as against other candidates for the same position. Another type of recall ballot placed two separate questions before the voters. The first question presents squarely the issue as to whether the incumbent officer shall be recalled, and requires the voter to express himself upon this issue. On the ballot will also appear a list of candidates to be voted upon to fill the vacancy, should the decision of the electors be in favor of the recall. The plan of having a separate expression of opinion upon the question of recall is distinctly more valuable than that of having an officer, sought to be recalled, merely run against such opponents as may care to present themselves. However, even though the ballot contains two separate propositions (1) as to whether the existing incumbent shall be recalled, and (2) as to who shall be his successor in case he is recalled, the printing of these two questions upon the same ballot unites them. Either type of ballot to some extent makes the recall election one in which the officer sought to be recalled is running, not merely against his record, but also against other candidates for the same office. Of course it would be possible to provide a plan by which the only issue appearing upon the ballot would be that of the recall of the officer, with provision that the vacancy

created by such a recall might be filled by appointment or by a separate election.[1]

Value of the recall

The recall involves political dangers, in that to a large extent it reopens a political contest that has once been decided. It has probably accomplished little in the way of political reform. Although adopted as part of a radical program, its most spectacular use has been to replace a radical governor by a conservative. The argument for its application to judicial officers is chiefly the fact that judges pass upon the validity of legislation, and to this extent determine issues of policy. In a few cases the recall has been applied to local judges, but in probably no cases with respect to matters arising out of issues as to the validity of legislation.

Possible usefulness

In the states, officers are elected for fixed, and usually for relatively short, terms; and there is no effective organization to prevent abuse of power during such terms, although state governors are coming to have larger powers to remove local officers. The recall adds to possible popular voting. It is supposedly a means of controlling officers elected for fixed terms. There is need for such control; yet this control can not be effective so long as we elect numerous officers, many of them with relatively unimportant functions. The chief result of the recall is to increase the possible number of elections. The cure for too great a burden on the voter is not to burden him further—though the recall may have some use in a simplified government, and the recall is capable of some use as an aid in simplifying government. One of the chief difficulties with our state judicial system is that judges are elected for short terms, and must, if they desire reëlection, keep in touch with political organizations. The remedy for this is not the recall, but relief from the situation that presents abuse. Judicial terms

[1] For the use of the recall in Oregon see Barnett, *The Operation of the Initiative, Referendum, and Recall in Oregon*, pp. 191-218.

may well be lengthened, and the recall applied by providing that at certain intervals an election shall take place to determine whether a judge shall remain longer in office. Under this plan it would be possible to elect judges for a much longer term than at present, subject to a periodical vote or the possibility of a vote as to whether they should continue in office. Continuance in office would then be established as a matter of course, unless the popular will should decide otherwise. A more effective popular control would be established, but with less popular voting. The same arrangement could be applied to many other officers, and was actually applied in a modified form to the mayor of Boston in 1909.

NOTE TO CHAPTER XIX

The referendum has long been used in this country; and the combined initiative and referendum have been used for nearly twenty-five years. The study of popular action upon measures should not be limited to the states that have adopted the initiative and referendum. Perhaps the best analysis of the influence of ballot forms on actual voting is C. O. Gardner, "Working of the State-wide Referendum in Illinois," *American Political Science Review*, V, 394. The first important work to deal with this subject was E. P. Oberholtzer, *The Initiative, Referendum and Recall in America* (New York, 1911). This book is important from the historical standpoint, but its supplementary chapters are distinctly hostile to the institutions under discussion. A collection of documents on the *State-wide Initiative, Referendum, and Recall* (New York, 1912), edited by Beard and Schultz, is still of value, although very much out of date. A. Lawrence Lowell, *Public Opinion and Popular Government* (New York, 1914), is of distinct value as an analysis of these institutions. J. D. Barnett, *The Operation of the Initiative, Referendum, and Recall in Oregon* (New York, 1915), analyzes in detail the working of these institutions in a single state.

The chief difficulty of the student is that of obtaining precise data upon the initiative and the referendum. For some years a little quarterly journal entitled *Equity* was published by Dr. C. F. Taylor of Philadelphia, and gave rather full information about these institutions. Unfortunately, this journal has now been suspended. The *American Political Science Review* gives some tables of value as to questions submitted in the several states. Before its suspension, the *American Year Book* each year gave valuable information. Now a student must to a large extent collect his own material for a detailed analysis of these institutions. A number of states publish publicity pamphlets, which may be obtained from the secretary of state of these states. However, it is ordinarily impossible to obtain such pamphlets unless they are

written for promptly. Local-option legislation in the several states constitutes an important example of local referendum. The information as to votes upon such legislation is more difficult to obtain than that upon state measures; and the same statement is true of other measures submitted to local vote. W. B. Munro, *Government of American Cities,* presents an account of direct legislation in city government.

The initiative and referendum have been extended from one state to another without a careful analysis of their detailed operation. It would be possible, although a somewhat difficult task, to obtain copies of all measures submitted through the popular initiative, and to analyze their draftsmanship as compared with that of measures enacted by representative legislatures. There is need for a thorough study of publicity pamphlets and of their influence upon popular voting. The problems presented in the preparation of petitions also deserve discussion. The material bearing upon emergency clauses is now of sufficient bulk to justify analysis. There has, as yet, been no satisfactory analysis of the initiative and referendum from the point of view of the influence of percentages in popular voting.

CHAPTER XX

THE FUTURE OF THE STATE

State lines fixed

THE state is an important governmental agency for central administration within its borders, and for the control of governmental functions performed by its local governing areas. If one were setting up a state organization entirely anew, he would not draw state lines as they are now drawn. But the present territorial division into forty-eight states of varying size and population is fixed as an historical fact. There are diversities in state population and in state governmental problems. Many states have great urban communities, whose problems are different from those of the more rural areas. Friction has frequently existed between great urban communities and other parts of a state; and in some states thus situated there has been a persistent and successful effort on the part of a less numerous rural population to dominate the urban communities. Much has been said at times regarding the desirability of setting up great urban communities as independent states. But the territory of a state can not be divided without the consent of the state itself and the possibility of a redivision of states is slight. Not only this, but there is a distinct advantage in having areas with diverse problems under one government. Even were it possible, it would be of doubtful wisdom to set up great cities as separate states. Such great cities need the political connection with rural areas, just as the rural areas need a connection with urban communities, in order that the policy of the state may be efficient and well balanced.

States as experiment stations

The states may be regarded as, to a large extent, political experiment stations. With forty-eight states

having somewhat similar governmental problems, yet with problems that are somewhat diverse, experimentation in governmental organization and in social and economic legislation upon the part of one state may prove of distinct aid to other states. Under the American federal system, with the states possessing great powers over their local problems, new devices and new programs can be tested out in one state, and other states profit by the success or failure of such experimentation.

Unintelligent copying

However, institutions are to a large extent taken over by one state from another as a result of unintelligent copying, rather than as a result of careful investigation. Of course, it is difficult to gage the success of political experiments. Unfortunately, the student of government does not have the conditions of a scientific laboratory, under which the influences of one particular force may be isolated and studied independently of others. Political and other influences upon governmental organization and institutions can not be limited by state lines. Commerce and industry are national in their scope, and commercial and industrial influences operate in much the same manner in all of the states. Such forces are dominated to a large extent, not from within each particular state, but from great national centers of commerce and industry. Business and investments are in no way limited by state borders, and those interested in investments in a particular state may bring influence to bear from without its borders. Not only this, but there are various national organizations whose definite object is that of urging policies in particular fields. The medical profession, for example, does not rely upon the members of its profession in each particular state, but to a large extent outlines its policies through national organizations which then, through local members, seek to carry out much the same policy in all of the states. The same is true of groups interested in political changes such as are involved in the initiative and referendum, and in

CHAP. XX

proportional representation. Strong national organizations also exist which bring great influence to bear with respect to educational progress within each particular state.

Influences not limited by state borders

Forces that bring about changes in state governmental organization or in state legislation are not restricted to the borders of the state itself. The adoption of a proposal by one state aids that proposal in other states, long before the success or failure of the proposal can be tested in practice. Influences that bring themselves to bear upon state and local government through organizations of various types, through commercial and industrial enterprises, and through newspapers and magazines, are in no way localized. Movements in state government, and experimentation in the field of state and local government, are therefore not isolated; for the political activities in one state are closely interwoven with those of its neighbors.

National problems

Problems that are primarily national will finally come under the control of the national government. Commerce and industry are national, not only in scope, but in their influence upon governmental institutions. The regulation of railroad rates is a striking instance in which both nation and state have sought to regulate a condition that is national in scope. The national government must finally supersede the states in this respect. But the movement to nationalize control over commerce and industry and over social institutions may easily go too far. Those back of a proposed reform are always impressed with the simplicity of urging that reform upon a single national organization, as against the slower and more deliberate process of obtaining its adoption by forty-eight separate states. Although it is difficult to obtain an amendment to the federal constitution, it may seem easier to obtain such an amendment than to obtain constitutional amendments upon the same subject in each of the forty-eight states. It often seems

easier to obtain legislation from Congress than from each of the state legislatures. It is easier to obtain immediately the desired object through federal action than through state action. We have been enormously extending the relationship of the national government to the individual in recent years. This movement has gone on to such an extent that the nation has become overburdened, and we have reduced popular responsibility for enforcing a policy that is once adopted. Not only this, but the adoption of a uniform policy for the whole country through national legislation may occasionally interfere with and impede state progress in the same field. In pure-food legislation, and in the readjustment of the relationship between employer and employee in the case of accidents, federal legislation with respect to interstate commerce to some extent impeded the proper adjustment of state laws to meet local conditions. Not only this, but a federal experiment adjusts itself to new needs with more difficulty than is the case with legislation in the separate states. This is particularly true if a proposed reform is embodied in a federal constitutional amendment.

Overloading the nation

We have tended to overload the national government, and to remove from the people in the particular states, and in the communities of these states, the responsibility for the enforcement of a policy once adopted. It is natural that if the national government adopts a policy and assumes the responsibility for its enforcement, the state and local areas of government should cease to be as much interested. In the expansion of national activities, the recently adopted plan of national subsidies is open to serious danger because there are no constitutional limits to such a plan. The subsidy scheme may be pushed as far as national revenues will permit. State governments will always be willing to surrender control over matters of local policy in return for payments from the national government.

CHAP. XX

Relative efficiency of state and nation

The tendency to rely upon the national government has been due not only to the greater ease in bringing pressure to bear upon a single governmental organization as opposed to forty-eight, but also to the fact that the national government has ordinarily, and rightly, been regarded by the people as more efficient than the state governments. The development of state governmental efficiency is necessary if a proper balance is to be preserved between national and state powers, and if the states are to continue to perform the functions for which they are better fitted than is the national government.

Influence of constitutions and statutes

For the basis of state governmental organization we must look to constitutions and statutes. But constitutions and statutes are like the steel framework of a modern "skyscraper." Other factors are equally as important, if we analyze the completed structure. Constitutions and statutes may remain substantially unchanged, but the structure and operation of government may change in essential respects. Written laws often remain after their life has departed. Increased ease of transportation and increased facility in the communication of thought are the most important factors in the determination of the functions of state government to-day. The development of transportation and communication have, of course, come along with and conditioned the development of modern large-scale industry. These economic factors have aided in producing great cities and have altered the character of governmental tasks. They have led to a great mass of state and national legislation, and to a complex governmental organization for the administration of this legislation. Perhaps the next most important development in the field of government has to do with the organization and functions of political parties. Party organization has reflected itself in a great mass of state legislation, but

parties have developed somewhat independently of such legislation.

Non-political influences

Influences not themselves political determine the nature and functions of government, and also the character and organization of political parties. These influences bring themselves to bear upon government. They play constantly upon the state legislature and the state executive, upon the courts, and upon local government. They bring changes in constitutions and statutes, but even without such changes they often alter governmental practices and attitudes. Constitutions and laws alone have not corrected, and will not correct, the evils that we have sought to remedy through civil service legislation. They sometimes aid in producing a public sentiment, which alone can finally correct governmental ills.

Unforeseen results of movements

The prohibition movement sought constitutional and statutory provisions for a particular purpose. It did not directly seek to change governmental forms, but it has had a great influence in developing state supervision over local government, and in altering the relation between the states and the nation. The movement for a federal income tax had no direct basis in a desire to increase national power as against the states, but it has furnished financial resources, which enable the national government to dominate the states through a system of subsidies.

CHIEF LINES OF STATE GOVERNMENTAL DEVELOPMENT

Departments of government

In the first state constitutions government was completely dominated by the legislative department. The first fifty years of state constitutional history were characterized by a readjustment of power among the three departments. The executive department became largely independent of legislative control, and the veto power of the governor was strengthened. The courts

CHAP. XX

established their power to disregard legislative acts that conflict with the terms of the written constitution. Throughout the entire history of American state constitutions there has been a development toward executive power and leadership. Increase of the power of the state governor has come chiefly through constitutional provisions, and through the enlargement of the governor's administrative power with the growth of state functions.

Local government

In more recent years, with the development of increased functions of government, the state has naturally used its local subdivisions to a greater and greater extent. With this increased use has come the establishment of state administrative control over local government areas in their performance of state functions. At the same time local government areas, and particularly cities, have been granted greater authority to deal with matters that are primarily of local interest. The municipal home-rule movement has reflected itself in a number of state constitutions. The development of state administrative control over local areas has been chiefly a matter of state legislation. With the increase in governmental functions, which must be partly performed from central state sources and partly by local areas as agencies of the state, it has been necessary to give greater consideration to the relationship between the state and its local governing bodies; but the problems arising out of this relationship have not been solved.

The courts

The increased functions of government have thrown constantly increasing burdens upon the judicial department. Each new governmental policy reflects itself, or is likely to reflect itself, in new civil relationships and in new criminal liabilities. The establishment of a new governmental policy, therefore, increases not merely the work of the executive department, but the work of the courts as well. With the increased functions to be performed by courts, and particularly with the great increase of judicial tasks in large urban communities,

judicial organization for the performance of this work has to a large extent broken down. Defects in judicial organization and procedure have produced the recent movement for a better and more unified judicial administration. It has come to be recognized that the problems of the judicial department involve serious administrative tasks, just as do those of the executive. The movement for a unified judicial administration and simpler judicial procedure has not as yet made great progress. It is, however, to some extent even now reflecting itself in state constitutions. To a still greater extent its influence is found in state legislation.

Administrative tribunals

Along with the pressure of new judicial duties has come a tendency to redraw the lines between judicial and administrative functions. This is illustrated in the field of workmen's compensation. New economic needs have forced new plans for the purpose of dealing with the compensation of industrial accidents, and under these new plans most of the issues have come to be settled by a simpler administrative procedure, rather than in the courts themselves—although there is a possibility of final appeal to the courts.

Relation between constitutions and statutes

Virtually all of the important changes in state governmental organization have reflected themselves in the development of complex state constitutions, limiting legislative power in detail and changeable only by popular vote. The provisions of these complex state constitutions are enforceable by the courts as against legislative authority. In the method of framing the first state constitutions no sharp distinction was drawn between state laws and the constitutions themselves; but a sharp line of distinction soon developed between the methods of framing state constitutions and framing state laws. This line was probably clearest about the middle of the nineteenth century. At the same time, however, that a sharp line of distinction was being drawn between the methods of changing constitutions and state statutes,

CHAP. XX

a great mass of detail began to come into the constitutions themselves. This tendency to place details in the state constitutions has persisted to the present time, and has naturally and necessarily led to the decreasing distinction between the methods of changing constitutions and statutes.

Administrative organization

The constantly increasing work of government has led to an increase in the number of officers and employees of the state, and also in the number of local areas for the performance of governmental work. The increase in the number of state governmental officers, and of local areas and local officers, for a time reflected itself in state constitutions. Each need for a new function often found recognition in a new office or a new local area expressly provided for in the constitution itself. The rapid growth of functions, however, has made it necessary that the greater portion of the administrative machinery be set up by legislation rather than by state constitutions. In both state and local government, and in both executive and judicial departments, there has been a steady growth of the purely administrative problems of government. These administrative problems have not as yet been effectively dealt with, although in a few states their existence has been fully recognized, in so far as they relate to the executive department.

Popular control

From the beginning there has been a continued struggle for effective popular control over government. Constitutional provisions have extended the right to vote; have removed property qualifications for office; have increased the number of elective officers; and in a number of states have established the initiative, referendum, and recall. During the past fifty years state legislatures have grappled with the problems of popular control over government. They have established an official ballot; regulated the methods of nominating for public office; and controlled in some detail the machinery of party organization. Along with the efforts by consti-

tutions and statutes to establish a popular control over government has gone a steady tendency to make the organization of such control more complex and more difficult. The movement for popular control has therefore been largely ineffective, although it has been supplemented by the development of the common-school system as an essential element in training for control in popular government. The school system has become the most important single enterprise of state and local government, but increased intelligence upon the part of the voter has not been sufficient to cope with the increased complexity in governmental structure and the increased burden placed upon the voter; and education of itself alone does not bring a higher standard of political morality. One after another, movements for governmental reform have been heralded as a means of reëstablishing popular control over government and of making government efficient. One by one, these reforms have been adopted. To some extent they have succeeded. Yet, singly and collectively, they have failed of the great purpose that they sought to accomplish. They have failed because each and all of them have left unaffected the complexity of government and the complexity of the task of popular control.

Movements for governmental reform

Movements for governmental reform sometimes start in local government and work upwards; sometimes in state government and work downward. Movements for the simplification of administrative organization started in the cities, and have spread to the states. The movement for a better control of governmental purchasing began in the cities. An effort to obtain better state and local accounts was started by the states, and has to some extent accomplished its results through some form of state supervision over local accounts. State laws may sometimes accomplish improvement for all of the local areas of the states. General laws for the state as a whole frequently require of all local governments certain safe-

CHAP. XX

guards which have been found proper, upon trial, by a few local governments or by the state itself. Little has yet been accomplished toward treating all governmental agencies, both state and local, as parts of a common organization for the accomplishment of common ends. Until all state and local organizations are regarded as agencies dealing with one general problem, little will be accomplished toward the simplification of the governmental structure.

MODEL STATE CONSTITUTION PROPOSED BY NATIONAL MUNICIPAL LEAGUE

No single plan possible

Numerous plans for the reorganization of state government have been proposed, of which the most important is a model state constitution tentatively drafted by a committee of the National Municipal League.[1] A brief outline of this model state constitution will sufficiently indicate the lines along which reform organizations are now moving. Diversities in state governmental problems do not permit of the drafting or adoption of a model state constitution. Not only this, but, even if a state constitution should be limited to fundamentals, such fundamentals themselves change, and any constitution that might be a model to-day would not be a model ten years from now.

Legislation

Under the plan of the National Municipal League, there is to be a single-chambered legislature, whose members will be chosen for two-year terms by a system of proportional representation. The governor's veto power over legislation is to remain, with the power to disap-

[1] Copies of this proposal may be obtained from the National Municipal League, 261 Broadway, New York. A discussion of some of the other proposals with respect to the reorganization of state government may be found in Holcombe, *State Government in the United States*, pp. 447-480. For an analysis by the present author of proposals made by Mr. Herbert Croly and by the People's Power League of Oregon, see *American Political Science Review*, IV, 243. The full text of the Oregon proposal will be found in Beard and Shultz, *Documents on the State-Wide Initiative, Referendum, and Recall* (New York, 1912), p. 349.

prove or reduce items in appropriation bills, subject to be overcome by a two-thirds vote of all the members of the legislature. The initiative and referendum are proposed for legislation, with the direct initiative. Measures are not to be approved unless they receive an affirmative vote of 20 per cent. of the total vote at the election. Upon emergency measures, a referendum is to operate as a repeal. Any bill that fails of passage by the legislature may be ordered to the referendum by the governor if at least one third of the members of the legislature vote in its favor upon final passage. Any bill vetoed by the governor, and not passed over his veto, may be submitted to the referendum by a majority vote of all the members of the legislature. A legislative council is provided, consisting of the governor and seven members chosen by and from the legislature. It is to be the duty of this council to collect information and to report thereon to the legislature.

Executive power

The executive power of the state is vested in a governor, holding office for a term of four years and elected by popular vote. There are to be such executive departments as may be established by law, and the heads of all such departments are to be appointed and removable by the governor. The governor and heads of executive departments are to be entitled to seats in the legislature, and are to be entitled to introduce bills therein and to take part in the discussion of measures, but are to have no vote. The legislature is given power to remove or retire the governor from office upon concurrence of two thirds of all its members.

Budget

An executive budget is provided for, to be submitted upon the responsibility of the governor. It is made the duty of the governor to appear before the legislature, or to send a designated representative to the legislature, when considering the budget, if a request is made by not fewer than one fifth of the members of the legislature.

CHAP. XX

Courts

Provision is made for the organization of a judicial department into a single court, composed of three departments. A judicial council is created, with power to make, alter, and amend all rules relating to pleading, practice, and procedure, and to control the general conduct of judicial business. The power to establish rules as to pleading, practice, and procedure is thus withdrawn from the legislative department and conferred upon the judicial department.

Other provisions

The proposed model constitution contains general provisions vesting power in the legislature as to a taxing system. It also contains provisions regarding the power of cities to frame their own charters and to exercise authority with reference to their municipal affairs. Counties are to be permitted to frame their own charters, and larger counties would be authorized to establish a consolidated system of municipal government. Express provision is made that the appointments and promotions in the civil service of the state, and of its civil divisions, shall be according to fitness, to be determined, as far as practicable, by competitive examination.

Amendments

Provisions for amendments to the constitution are made relatively simple. Amendments may be proposed by a majority of the members of the legislature, and adopted by a majority of the voters voting on the question, if the affirmative vote is equal to 20 per cent. of those voting at the election. They may also be proposed by popular petition, subject to adoption under the same conditions. A convention may be called by a popular vote, resulting from either legislative action or popular petition; but to approve the calling of a convention 20 per cent. of those voting at the election are necessary.

Summary

The proposed model constitution of the National Municipal League seeks to develop certain tendencies in state government that have been referred to. The plan seeks to simplify and to unify the work of the executive and judicial departments. It seeks also to do away with

a good many of the limitations upon state legislative authority. At the same time, the plan seeks to establish the initiative and the referendum, and the principle of municipal home rule for cities. It authorizes proportional representation. The governor's power is definitely strengthened, although a legislative council is set up, with powers that may encroach upon those of the executive department. With reference to the relationship between the executive and the legislative department, the plan represents a compromise. As originally proposed, it contemplated the application of a modified city-manager plan to state government. Under this plan, a single-chambered legislature would have been provided. The legislature would have chosen a legislative council, whose chairman would have the title of governor; and this council would have chosen an administrative manager to conduct the administrative affairs of the state. This plan had merit in that it sought to separate the policy-determining functions from those that are purely administrative. In state government some permanent organization must, however, determine many matters of administrative policy; a plan that seeks to separate these determinations of policy from the task of administration is of doubtful wisdom. Under the plan finally adopted by the league, the powers of the governor are strengthened; although the possibility of reducing executive independence is presented through the establishment of a legislative council, and through the power of the legislature to remove the governor by a two-thirds vote.

THE TWO-FOLD PROBLEM OF STATE GOVERNMENT

Two problems

The successful operation of state government involves (*a*) the effective doing of state business and (*b*) the effective popular control over the policies of government. The existence of an effective popular control over government often limits the effective performance of govern-

CHAP. XX

mental work; for popular government can not use an effective means of administration so long as that means is opposed by those who control the government itself. In order to obtain both of these results, there must be in every government a group devoting its entire time to government work. In order to be efficient, this group must be permanent. It is necessary that there be a political control determining the policies to be executed by this permanent group.

Limited time of the citizen

The citizen who must earn a living can by no possibility give a great deal of his time to the study of governmental conditions and problems. The same is true of a public officer who is chosen to give only a small part of his time to governmental affairs. President Lowell has said: "Mankind is, and as far as we can see is likely to be, composed of some very good people, some very bad ones, and a large number who are well meaning but more or less indolent and indifferent when their personal sympathies or interests are not touched, and the test of any institution is the fruit it will bear in a community of that kind."[1] A slightly different form of statement may be more accurate. The real issue is, how may government best be operated, since the citizen, good, bad, or indifferent, can give only a relatively small part of his time to its operation?

Limits upon the citizen's action

Government can never be made simple; and, with increasing problems to be solved by governmental action, it is certain to become increasingly complex. But this does not mean that the machinery of popular control over government can not be simplified. It is necessary to distinguish between the technical and the political functions of government. The individual voter can never have the time, nor can he be expected, to pass judgment upon the technical problems of government. He can pass judgment upon matters of general policy, and he can express an opinion as to whether or not he is satisfied

[1] *Public Opinion and Popular Government*, p. 223.

with the conduct of governmental affairs. He can choose important officers; and in a limited number of cases he can express an opinion upon questions of general policy, independent of personalities.

Permanent officials

The technical functions of government must be conducted by a permanent staff of officers and employees who are chosen and retained in their positions because of technical competence. Civil service laws have clearly not solved the problem of maintaining in public office a permanent technical staff for the conduct of detailed governmental affairs, though they have bettered previous conditions. The actual work of government must be in the hands of a permanent group; and under our present system this group is largely composed of members of party organizations, who change with the change of parties. As long as the permanent group operating government is composed of those obtaining office as a reward for party service, the individual voter is hopelessly in the hands of his party organization.

Information and the citizen

It has been said that the chief means of making government better is to bring information regarding it to every citizen. The difficulty of obtaining accurate information is in direct proportion to the complexity of government. In such a community as Chicago, for example, a number of civic organizations devote the time of their paid staffs to an effort to keep informed about certain governmental matters, and they are not successful even in this. Civic organizations are somewhat specialized, and one organization often does not know the facts about governmental problems that are published by another. To what extent can the individual be informed or inform himself about the details of such problems, without the necessity of devoting his whole time to such a task, with even then unprofitable results?

The political function

If a clear distinction is once made between the permanent and technical staff for the conduct of government on the one hand, and the political function of controlling

CHAP. XX

the policy of government on the other hand, a possibility presents itself of placing upon the voters a responsibility merely as to the political function. The political function of government consists in the determination of general policies. If the two chief political parties make a definite issue as to the conduct of state or local government, the voter may well be able to express a definite and intelligent view upon the issue so presented; but he can not express an intelligent view as to the detailed issues now submitted to him, or as to the great number of candidates for relatively unimportant public offices.

Legislation

The principle of human limitation presents itself also in connection with the problem of legislation. No citizen can keep informed of all the measures under consideration by a state legislature during its session. A member of the state legislature, who is required to give only a few months of each two years to his official duties, must necessarily devote a large part of his time to affairs that will yield him a financial return. A state legislator is not chosen for any expert or technical knowledge of the problems of legislation. He probably should not be so chosen. No conscientious member of a legislative body can keep informed upon all the measures submitted to him for action during a legislative session; and no member can keep informed as to the legislative steps being taken, even with respect to the more important measures, without the employment of assistance of such a sort as is pecuniarily beyond his means. So complex are the problems of local and state administration now presented for legislative action that not even an organization with a large staff, devoting itself entirely to this matter during a legislative session, can keep itself adequately informed upon all of the more important measures.

Limitations of legislatures

Where legislatures are unlimited as to the length of their sessions, many members go to their homes over each week-end, and seek to maintain some connection not only with the views of their constituents but also with

their private affairs. A connection with their constituents, maintained in this manner, is important. Connection with their private business so maintained is necessary, unless a legislator is to obtain revenue from unknown and undesirable sources in addition to that which he receives for his public services. The present task of legislation is too complex and too technical for all its problems to be dealt with successfully by members of a popular body, elected without much reference to technical experience, and who must devote a relatively small portion of their time to this undertaking. A fairly large popularly elected body is desirable for the purpose of passing upon policies of legislation. Is it not possible to retain a large popular legislature as a body to express popular judgment upon matters of legislative policy, and at the same time to divest this body to a large extent of the work of passing upon technical issues?

Possible simplification of legislative task

State legislation now seeks to determine all details, rather than to lay down principles of general policy. It is possible, through a carefully defined rule-making power, to vest in the executive department power to carry out the details of a legislative policy. Much in the way of simplifying legislative work may also be accomplished by simplifying local government, and by establishing a permanent organization to collect and present to the legislative body, when it assembles, the actual facts as to the working of the permanent administration in each important field of government. Upon problems of local administration a state legislative body must now almost of necessity act blindly, because there is no permanent organization for the proper collection and presentation of information. Even assuming that the task of legislation may be simplified, there still remains a serious problem with respect to technical matters upon which the popularly elected legislature must continue to act directly. It is essential that there exist, between state legislative sessions, some organization for the prepara-

CHAP. XX

tion and presentation of a legislative program, with an analysis of the facts upon which such a program is based. No legislative body can itself, during relatively short sessions, collect data necessary for intelligent action.

The executive and legislation

The executive department of the state under our system of government has the most satisfactory means of elaborating a legislative program for presentation to each successive session of the legislative body. In the elaboration of such a program it is desirable that a small group of legislative leaders shall have a share; and the members of such a group must obtain some compensation for their increased services. A continuing body, composed largely of legislative members, should not, however, be permitted to establish a continuous control over the permanent administration. As long as we have the present relationship between the executive and the legislative departments of state government, the executive should have the complete responsibility for the execution of policies.

Similar problems of the voter and the legislator

The separation of the technical from the political functions of government has a direct bearing upon the problems both of the voter and of the legislator. The voter can not be informed of all the details of the government over which he should have control. The legislator can not be informed of all of the details of the governmental administration over whose policies he should exercise control. Effective control over the general policies of government by the voter and the legislator can be established only if these two groups definitely abandon the effort to supervise every detail of governmental work.

Politics and administration

Too little attention has been given to the establishment of a line between those officers who are responsible for matters of public policy, and who therefore should be popularly elected, and those who are responsible for the carrying out of policy and as to whose qualifications the people can not have any real opinion. Two things are

accomplished by drawing a line between these groups. In the first place, the task of the voter will be simplified to such an extent that he may express an intelligent judgment upon matters of policy; and in the second place the executive will be given power to see that policies so determined upon are carried out. The reduction in the number of elective officers in a very real manner increases the influence of the voter over his government.

THE PRESENT DIRECTION OF STATE PROGRESS

Need for improvement

State government is a piece of machinery for the doing of certain definite tasks. It does not now accomplish its purpose satisfactorily. Government at its best is capable of great improvement. Our state and local governments are awkward and cumbersome. They bear upon their faces not merely the stamp of present need, but the influence of centuries of historical development. Much of their content is a useless remnant of the past. In this respect they are not unlike other human institutions. During the past twenty years much has been accomplished toward the improvement of state and city government; but much remains to be accomplished. In the field of local government other than cities, the situation has become worse in recent years rather than better.

Proposal of parliamentary system

A number of writers have urged that improvement in state government lies in the direction of the abandonment of the principle of the separation of powers, and the adoption of the English plan of parliamentary government. The principle of the separation of powers has not been highly useful in our constitutional system, and something may be gained by abandoning it; but it is doubtful whether the line of immediate progress lies in the direction of adopting the parliamentary system. In order to adopt such a system we must reverse the whole process of state constitutional development, and make the heads of state executive departments members of the

legislature and responsible to it. In order to do this we must set up a titular governor as a figurehead, although state constitutional development has steadily strengthened the powers of the governor. The adoption of the parliamentary system is not in line with present American tendencies, and it must come in the far distant future, if it ever comes. Much the same is true of the proposed application of the so-called city-manager plan to state government. This would involve the subordination of the governor to the legislature and his choice by that body. It proceeds upon the incorrect assumption that the functions of the state executive are purely administrative and have little to do with the determination of policy.

Lines of present progress

The most promising lines of immediate development in state government may be summed up as follows:

(1) Provision should be made for a governor with a term of at least four years, and with an even longer term if he is made ineligible to succeed himself; the governor to be given the appointment of a small group of heads of executive departments, responsible to and removable by himself.

(2) A single-chambered legislative body should be established with a fairly large membership, but with a small permanent committee to aid the head of the executive department in the preparation of a legislative program. The committee organization of the legislature should be so constituted as to conform with the organization of the executive department.

(3) The legislature should cease to deal with a great mass of detail that it now embodies in legislation with respect to state administrative policy, local government, and judicial procedure. By doing so it will regain a power to supervise all matters of general policy.

(4) A unified judicial system should be established, with such supervision by the highest court, or by a judi-

cial council, as may establish a coördinated administration of justice.

(5) Local areas should be so organized that the citizens of each community shall, as far as possible, be controlled by but one local governing body. At the same time the units of local government should be sufficiently large to permit of administrative efficiency.

(6) The state should organize a continuous supervision over all units of local government, with respect to functions performed by local governments that have a direct bearing upon the interests of the state. It should leave to local communities a large degree of authority in their organization for, and their performance of, purely local functions. The areas of local government must be sufficiently large not only to perform their governmental tasks satisfactorily, but also to be effectively supervised. By establishing larger areas for health and school administration, Ohio has in recent years done a good deal toward making possible an effective state supervision over local areas.

(7) In order that local areas may perform their tasks satisfactorily and may be effectively supervised by state government in their work as state agencies, each local area must have a single and responsible administrative officer. The governor must be completely responsible for results achieved through state administration; and some officer in each local area must stand in the same relationship to its administrative affairs as does the governor to the state administration.

With an organization such as that just outlined, a distinct executive responsibility will be established. The short ballot and the simplification of elections will come, as they should come, not because they possess inherent value, but as incidents of a more efficient governmental organization. With such variations in size and in problems as are presented by the states, no one state can

CHAP. XX

afford to copy blindly from another. Some will make progress more rapidly than others, and each state should profit by the success or failure of the others.

Continuity of policy

Under a system of government that relies upon the periodical election of executive officers for fixed terms, a serious problem presents itself as to the establishment of continuity in governmental policies. Each newly elected administration tends to set up new policies; and under our present system of party dominance it also tends to set up its own administrative organization, and largely to tear down that which has been erected by the previous administration. The plan of electing executive officers for fixed periods necessarily means a shifting of control when a new executive is elected. It also necessarily involves the possibility of a political lack of harmony between the legislative department and the executive department, unless a single-chambered legislature is composed of members elected at the same time as the governor and for the same term. The plan of an independent executive, which has been adopted both in our national and in our state governments, necessarily involves these two problems. But the problem of continuous administrative policy is equally as much involved in the parliamentary system, for this system involves a change of governmental control with the change of party dominance. Continuity of administrative policy under either system depends upon the establishment of a permanent technical staff for the detailed work of government.

Relation between executive and legislature

The problem of maintaining political agreement between the executive and the legislature is a difficult one under the independent executive plan. By independent executive is meant an executive whose tenure is independent of the legislative body. Under the parliamentary system the executive changes with the change of party control in the legislature. Under the independent executive plan, the executive who has been elected for a fixed

term remains in office, irrespective of the election to the legislature of those not in political harmony with him. The independent executive is removable normally only by impeachment, although the National Municipal League would permit his removal by a two-thirds vote of the legislature. Neither arrangement, however, is devised for the purpose of maintaining political harmony between the legislature and the executive. In connection with this problem it can only be said that other matters are equally as important as maintaining this political harmony between the legislative and executive departments; and that our political development has taken place without political machinery that makes necessary the maintenance of such a harmony. Not only this, but in a large number of the states one political party is continuously in control, and the present problem is not so much the maintenance of political harmony between the executive and the legislature as it is the maintenance of harmony between officers independently elected by the same party. The maintenance of a workable arrangement between the legislative and executive departments in the states depends quite as much upon the personality of the executive as upon the executive's belonging to the same political party as does the majority of the legislature.

Official reports

With respect to state governmental organization, it is important to comment upon government reports. At the present time we have substantially nothing in the way of published official reports upon which the citizen may rely. The number of independent governmental bodies that make reports is so great that no citizen will have the time to obtain copies of all such reports and to study out the relationship among the various overlapping governmental bodies. A simplified plan for the reporting of the work done by government can come only with a simplified government. In Illinois, under the civil administrative code of 1917, a plan has been adopted by which a single

CHAP. XX

annual report is issued by the nine departments under that code. However, in order to discover all of the executive activities of the state government in Illinois, it is necessary for the citizen to obtain reports of five elective state officers, and of a number of other bodies as well. This the citizen can not well do, and in the multiplicity of reports he is more completely lost than if no official reports were made. The same situation presents itself with respect to any given area of the territory of the state. Those who serve popular government should be required to present periodical reports that will give a real indication of the results obtained. Official reporting constitutes one of the most effective means of holding public officers to popular responsibility; but efficient reporting can come only with an effective governmental organization that can be held responsible. True public opinion can be based only on accurate information. Complexity of government makes it difficult to obtain accurate information, and equally difficult the influencing of government upon the basis of such information.

Standards

At present we have no real standards of efficiency in government. As has already been pointed out, government, if it fails financially, resorts to bond issues and to taxation. Bond issues are often paid by a succeeding generation, and are naturally looked upon by those who are administering an unsuccessful organization as the most attractive form of financing.

Forms of government

In government, as elsewhere in human affairs, the form of organization and the machinery employed largely determine the effectiveness of human effort. Forms of government are not in themselves important, except as they aid in the accomplishment of results. We have much the situation presented by early agricultural machinery as compared with the more effective machinery in use to-day. The machinery itself is unimportant, except as it accomplishes more desirable results. We discard an obsolete piece of machinery and

use the new. In government the old machinery is ourselves and our traditions. We can not altogether discard the old; but the success of government depends upon our ability to adapt the old to new needs and new conditions. Changes in the machinery of government will not bring the millennium, but they will help make it possible for the people to have the government they desire. Whatever the organization, the standards of government are determined by those who control the government.

INDEX

Absent voting, 470
Accounts, local, 451; state, 418, 440
Administrative reorganizations, 246, 259-262; problems of, 262-277
Administrative tribunals, 354, 553
Admiralty jurisdiction, 40
Advisory opinions, 303, *note;* 324
Age, voting, 459
Agriculture, activities of state, 7
Alabama, consolidation in, 257
Amendment, constitutional, see Constitutional amendment
Appointing power in governor, 95, 242
Appointment of judges, 331; of local officers, 288
Apportionment, 169-177, 230
Appropriations, classification, 440. See also Budget
Arbitration of controversies, 356
Architects, supervision, 8
Articles of confederation, 45
Assessment, for taxation, 424-429
Attorney general, 237, 290, 318
Auditor, 238
Australian ballot, 480
Automobile, influence on state policy, 292, 301; taxation, 422

Ballot, form and size, 465-467, 468, 480; non-partizan, 182, 333, 492-494; titles for measures, 521
Banks, 7, 44, 99
Bicameral system, 156-162, 176, 390
Bills, introduction and source of, 201; steps in consideration of, 202
"Blue sky" laws, 8
Boards, county, 370-371
Boards, number of, 244
Bonds, see Debts
Boss, 488
Boston, 58, 444, 544
Boundaries, state, 24, 51, 546
Budget, local, 446; state, 250, 251, 253, 255, 270, 434-442
Building, state building program, 271

California, consolidation in, 256, 261
Charitable institutions, management, 247
Charities, county as area for, 368
Checks and balances, 80
Child labor case, 44, *note*
Cities, classification, 65; consolidation with counties, 402-405; debts, 88, 99, 447-451; home rule, 67-69, 88, 102, 392, 393, 395; legislative under-representation, 172; metropolitan areas, 57; organization and problems, 388-395; relation to counties, 400, 401; as school areas, 397; special legislation, 64-66; special problems, 58, 393; streets, 57; suburban communities, 57, 393, 403-404. See also Local Government
Citizenship, as qualification for voting, 20, 458
City manager, 391; proposal for state government, 559, 566
City planning, 57
Civil cases, 304
Civil service, 87, 273, 374, 393, 442, 561
Claims against state, 303, *note;* 323
Classification of cities, 65
Classification, for taxation, 425
Clerks of courts, 338
Commerce, federal regulation, 41-44
Commission government, 390, 391
Commission-manager plan, 391
Commissions, constitutional, 120
Commissions, number of, 244; use in state administration, 267-269, 272
Committees, legislative, 196-200; conference committee, 203
Common law, 18, 189, 304
Compacts among states, 52
Compromise, as an element in legislation, 207
Comptroller, 238
Concurrent powers, 129
Congress, 30, 31
Consolidation of local governments, 401-405
Constabulary, see State police
Constitutional amendment, federal, 35-36; state, 103, 115-121

Constitutional conventions, 112-115; representation in, 126-128
Constitutions, state: amendment, 103, 107, 115-121; character of present, 103-110; methods of change, 111-128; extent of change, 125; enforcement of, 133-155; first constitutions, 93; function of, 109, 122-124; judicial construction, 38-40, 97, 133-155; legislation in, 109, 264, 406, 537, 553; influence of, 550; types of provisions, 148-152
Constitution, United States: amendment, 35-36; construction, 38-40, 135, 138-141
Conventions, see Constitutional conventions, Nominating conventions
Coroner, 317
Corporations, creation and control, 7; influence of corporate form of organization, 496
Corrupt practices, 469, 474
Cost of state government, 413
County, as judicial area, 338, 366, 367; as school area, 397; consolidation, 402-405; functions, 366-369; home rule, 68, 376; organization and problems, 364-379; small counties, 73, 379; subdivisions, 387; variations in size, 361. See also Local government
County clerk, 373
County courts, 327
Courts, as law-making bodies, 18, 189; as enforcers of state policy, 283, 300; appellate work, 328-330, 350; organization, 86, 106, 325-328, 341-359, 552; functions, 82; administrative control by, 282-285; procedure and rule-making power, 78, 228, 339, 351-353; elective clerks, 338; federal, 138; administrative problems, 302; increased work, 301, 310; judicial election areas, 71; small cases, 343; final interpreters of constitutions, 38-40, 97, 133-155; suggested organization, 566. See also Judges
Criminal cases, 303, 310-322
Criminal justice, 344
Criminal law, 190, 283
Cumulative voting, 178-180, 230

Debate, in state legislatures, 202
Debts, state, 98, 100, 442-445; local, 99, 407, 447-451
Declaratory judgments, 357
Defectives, care of, 6
Delegation of legislative power, 225-229, 232
Departments of government, the three, 75-88, 551
Deposit, of public money, 433
District attorney, see Prosecuting attorney
Division of powers, 75-88
Draftsmanship of initiated measures, 513
Due process of law, 142

Earnings of state departments, 422
Economic development, influence on government, 4
Education, choice of school employees, 88; system of public education, 89; superintendent of public instruction, 236; local areas for, 396, 397; state expense, 413
Educational qualification for voting, 459
Efficiency and economy commissions, 248
Elections, areas for, 70, 71, 468; county as area for, 368; expense of, 470; less frequent, 467; machinery of, 467-473; non-partizan, 182, 333, 492-494; plurality choice, 177, 471; state and national on same day, 37; task of voter, 463-465, 564
Electoral college, 32
Emergency measures, under initiative and referendum, 517-521
Employees, see Officers and employees
Equity, 304-307
Executive Council, 94, 229, 233
Executive department, development of powers, 95-97; elective officers, 264; functions, 82; organization, 85, 105, 234, 248; control of state policy, 279; plural executive in states, 234; types of executive functions, 248-250; unified, 441; and budget, 270; relation with legislature, 568. See also Governor.
Expenditures, state, 410-420
Experts in state government, 87, 273, 442, 461

"Favorite sons," 34
Federal aid, 45, 49, 53, 549
Federal government, characteristics in United States, 24, 30, 38. See also Constitution, United States
Fees, of state departments, 422

Finance, local, taxation, 445; budget 446; debts, 99, 447-451; accounts, 451
Finance, state, expenditures, 410-420; revenue, 421-432; deposit of public money, 433; budget, 270, 434-442; debts, 98, 442-445; governor's control, 238, 270, 439
Functions, governmental, 9, 55-59, 68; of counties, 366-369; of cities, 392-393

General property tax, 423-429
Gerrymander, 170
Government, characteristics, 3-22; purpose, 4, 14; a fundamental institution, 22; complexity, 12; expansion of functions, 8; change in organization, 9; forces which change, 91; standards in, 276, 411, 570; distinction between political and technical functions, 559-565
Governor, election, 95, 223; term, 244, 262, 264; succession to office, 235; powers, 239-245; share in legislation, 84, 214-218, 231; financial control, 238, 439; effect of administrative reorganizations on, 250-262; a responsible leader, 276; as representative of whole state, 223; development of independence, 95; senate confirmation of appointments, 229; special legislative sessions, 185; suggested powers, 566
Governors' conferences, 52
Graft, honest, 433
Grandfather clause, 457
Grand jury, 311-314
Group influences, 498, 499

Health, state activities, 6; professions affecting, 8; union of governments to protect, 13; relation between state and local authorities, 293; forces controlling health administration, 500
Hearings, 205
Highways, see Roads
History, influence on government, 11
Hodges, Governor, of Kansas, 157
Home rule, 67-69, 88, 102, 393-396; county, 376
House of Representatives, United States, 31

Idaho, administrative reorganization, 260
Illinois, civil administrative code, 260; chart of organization, 263; cumulative system, 178, 230; legislative rules, 211
Immigrants, 393
Impeachment, 229
Implied limitations, 134
Implied powers, 38, 39
Income tax, 429; influence of federal, 45
Indiana, experience with constitutional change, 119; consolidations in, 252
Indictment, 313
Industry, state activity, 6
Information, 313
Initiative and referendum, development, 103, 505-510; analysis of plans, 510-526; results, 526-533; effectiveness, 533-540; occasions increased voting, 464; constitutional amendment through initiative, 121
Injunction, 282
Injunction and abatement laws, 283
Insane, care of, 56
Intangible property, 424
Interest, on public money, 433
Interstate commerce, 41-44
Interstate relations, 50-53

Joint committees, legislative, 197
Journals, legislative, 195
Judges, choice of, 97, 330-332, 335; tenure, 332; non-partizan elections, 333; removal, 229, 335; retirement, 336; pensions, 336; compensation, 377; recall, 146, 337, 540-544. See also Courts
Judicial control, see Unconstitutional legislation
Judiciary, see Courts
Jury trial, in civil cases, 307-309; in criminal cases, 314-316
Justice, need for department of justice, 353; equal, 358; county as area for administration of, 366, 377
Justice of the peace, 325, 342
Juvenile courts, 328

Kansas, consolidation in, 258

Law, nature of, 14-19; practice of, 8, 322; uniformity of, 51
Legal aid societies, 359
Legislation, technical defects in, 208, 231, 513
Legislative reference bureaus, 225, 231
Legislature, the law-making body, 17; early supremacy of, 75, 94;

function of, 77, 81, 219-230; decline of powers, 80; organization, 85, 105, 156; representation in, 126-128, 171-177, 498-500; limitations on, 98-100, 131-133, 134, 136; official names of legislative bodies, 163; two-house organization, 156-162, 176; size and apportionment, 163-177, 230; compensation, 186; mileage, 186; sessions, 100, 183-185; procedure, 193-214; last days of session, 210-213; governor's share in work of, 214-218, 231, 568; character of work, 188-191; committees, 196-200, 203; absence of legislative program, 203, 221; party issues in, 182, 203, 217-218; possible lines of reorganization, 224, 562-564, 568; non-partizan election, 182, 493; election districts, 70; proportional representation, 180, 477, 478; grants of power to, 144; hearings, 205; lobby, 204; criticisms of, 222; control of members, 206; financial control, 441; influence of initiative and referendum on, 536
Lobby, 204-206
Local government, as an agency to enforce state policy, 279-299; relation to state, 13, 54-73, 88, 407, 408; functions of, 9, 55-59, 68, 366, 392; forms of, 59-62, 363; consolidation, 403-405; developments in, 552; multiplication of areas, 463; need for broader powers. 226; special districts, 385, 399-401; suggested organization, 567; two-fold problem, 360; accounts, 451; assessment of property, 426-429; budget, 446; debts, 99, 447-451; expense, 419; tax rates, 445
Local option laws, 66, 395, 401
Lieutenant-governor, 217, 235
Litigation, avoidance of, 355
Los Angeles county, 377
Louisiana, suffrage qualifications in, 457

Majority, 472
Mandamus, 282
Married women, see Women
Marshall, chief justice, 39, 40
Maryland, budget plan, 436
Massachusetts, administrative reorganization, 260; budget plan, 437; legislative rules in, 213
Masters, 351
Maternity welfare, federal aid, 45
Mayor-council government, 389, 390
Medicine, practice of, 8
Metropolitan areas, 57
Michigan, administrative reorganization in, 250
Migratory birds, 44
Militia, 49
Mining, state activity, 6
Minnesota, non-partizan election of legislature, 493
Minority government, 533
Minority representation, 178-180, 230
Municipal courts, 326
Municipal debts, see Debts
Municipal home rule, 67-69, 88, 102, 393-395; county, 376

Nation, see United States
National Municipal League, model constitution, 556-559
National Tax Association, model tax system, 432
Navigable waters, 40
Nebraska, administrative reorganization, 260; budget plan, 437; constitution, 104-107
Negro suffrage, 21, 456-458
New England town, 380-382
New Jersey, consolidations in, 254
New states, 24, 26
New York, consolidations in, 252
Nominating conventions, 34, 481
Nomination, of candidates, 481
Non-partizan elections, 182, 333, 492-494
North Carolina, constitution of 1776, 93

Office, property qualifications, 102
Offices, multiplication of, 242; popular election to, 102
Officers and employees, appointment, 95; elective state officers, 234; county, 374; removal of state and local, 286, 287; retirement and pensions, 275; personnel problems, 87; permanent experts, 87, 273, 442, 561; tenure, 274; problem of, 561
Ohio, administrative reorganization, 260; chart of administrative organization in 1920, 247
Overlapping areas, 10

Pardons, 321
Parks, 57
Parliamentary system, proposed introduction, 565
Parole, 321
Parties, see Political parties

Party-column ballot, 465, 473, 481
Penalties, criminal, 322
Pennsylvania, constitutional commission in, 121
Pensions, judicial, 336; for public employees, 275
Personnel, see Officers and employees
Petition, under initiative and referendum, 514-516
Plurality, 177, 471
Pocket veto, 216
Police, 58, 292
Policy, continuity of, 272, 442, 568
Political influences, types of, 21, 495
Political opinion, organized expression, 484-500
Political parties, function of, 90, 476, 478, 486; two-party system, 476-480; legal control of, 480-484; small parties, 479; membership, 486; principles, 487; issues in legislature, 182, 203, 217-218; party issues, 479; under cumulative system, 178-180; proportional representation, 181, 477; presidential nominations, 32-35; influence of initiative and referendum on, 538
Poor relief, 6, 368
Popular control over government, 476, 555
Population, representation of, 168-177
Precinct, election, 468
Preferential voting, 471
Preliminary hearing, 316
President, election, 32-35
Presidential primaries, 34
Primary elections, 34, 482
Probation, 321
Prohibition, influence of, 291
Property, qualifications, 101, 455
Proportional representation, 180-182, 477
Prosecuting attorney, 312, 316, 317-319, 320, 372
Protective functions, 5
Public business, 410-412
Public defender, 319
Public opinion, organization of, 484-500
Public utilities, 7, 77, 226
Publicity pamphlets, 521
Purchases, 270

Railroads, influence of, 43; regulation of, 41-43, 44
Readings in legislatures, 197
Recall, 102, 464, 540-544; of judges, 146, 337; of judicial decisions, 146
Referendum, defined, 502. See also Initiative and referendum
Registration of voters, 460, 469
Removal, of state officers, 286; of local officers, 286, 287
Reports, official, 275, 278, 569
Representation in state legislatures, 171-177; sectional, 223; in conventions and legislatures, 126-128; territorial or group, 498-500
Republican form of government, 27
Reserved powers, 40-42
Revenues, state, 421-432
Revolution, right of, 128
Roads, state activities, 6, 56; state expense, 414; federal aid, 45; state supervision over local officers, 288; county as road area, 367; bonds for, 444
Rule-making power, administrative, 227-229, 232
Rules of court, 78, 228, 339, 351-353
Rural communities, in North Carolina, 399

Safety appliances, 41
School districts, 69, 396, 397
Schools, see Education
Secretary of state, 236
Securities, control of sale, 8
Senate, approval of executive appointments, 229, 232, 265
Senate, United States, 30
Separation of powers, 75-88
Sheriff, 373
Short ballot, 466, 567
Social legislation and the courts, 143
Soldiers' bonus, state bonds for, 444
Speaker, 217
Special charters, 395
Special districts, 386, 399-401
Special legislation, 64-66, 100, 192
Special sessions, 185
Split sessions, 184
Standards, in state government, 276, 411, 570
States, boundaries, 24; compacts among, 52; continuity of policy, 568; controversies between, 50; central state administration, 293-296; claims against, 303, *note;* 323; deposit of money, 433; equality of, 25, 26, 27; formed from national territory, 29; future of, 546-570; functions, 4-8, 49, 55-59, 68; increased

work, 47; limitations on powers, 129-155; lines of progress, 565-571; position in the nation, 24-50, 90; relation to other governments, 3; relations with local government, 54-73, 88, 289, 407, 408; reserved powers, 40-42; subsidies to local governments, 289, 420; two-fold problem, 559, 560
State debts, 98, 100, 442-445
State finance, 410-453
State police, 292
State policy, relation between announcing and enforcing authority, 297-299; courts as enforcing authorities, 300; enforcement of, 277-299
State taxation, 421-432
State's attorney, see Prosecuting attorney
Statutory revisions, 231
Street traffic, 58
Streets, 57
Subsidies, federal, 45, 49, 53, 549; state subsidies to local government, 289, 420
Suburban communities, 57, 393, 403, 404
Suffrage, extension, 20, 101; qualifications, 454-461
Suits against state, 303, *note;* 323
Superintendent of public instruction, 236
Supplies, 270
Supreme court, 326. See also United States Supreme Court

Taft, chief justice, 42
Taney, chief justice, 40
Taxation, state, 421-432; constitutional provisions, 425, 432; nature of, 19-20; problem of, 90
Tax commissions, 428
Taxpayers' actions, 283
Tax rates, 431, 445
Tennessee, consolidation in, 258
Term of judges, 332
Texas, consolidation in, 259
Town, New England, 380-382; as school area, 397; outside of New England, 381-385, 386
Township, presentation on county board, 371, 381-385, 386. See also Local government
Treasurer, state, 237
Treaty-making power, 44

Unconstitutional laws, 97, 133-155
Unicameral system, 162
Unified court, 347-350
Uniform laws, 51
United States, a nation, 28; superiority of, 40-48; expanding power, 43-45; subsidies to states, 45, 49, 53, 549; act directly upon individuals, 45-47, 54; co-operation with states, 48-49; powers limit those of states, 129-133; territorial subdivisions, 46; relation of states to, 90, 548, 549. See also Constitution, United States
United States Supreme Court, interpreter of United States constitution, 38-40, 135, 138-141; controversies between states, 50
Urban areas, 57

Veto power, 96, 214-218, 231, 435
Vice-president, 32-35
Villages, 396
Vocational education, federal aid, 45
Vote, see Suffrage
Voter, task of, 463-465, 564
Voting, compulsory, 472

Waite, chief justice, 43
Washington, administrative reorganization, 260
West Virginia, consolidation in, 258; budget plan, 438
Wisconsin, administrative reorganization in, 250
Women, suffrage, 21, 456; married women's property rights, 23; changed legal status, 300
Workmen's compensation, 6
Written constitutions, 38, 131

JUL 7
FEB 3
FEB 8

JUN 2 1 1973

353.9
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